United Nations Mechanism for International Criminal Tribunals: Necessary or Avoidable? An Analysis of the Different Options for the Residual Functions of the Ad Hoc International Criminal Tribunals

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Abstract

When closing ad hoc Tribunals, the Security Council is faced with the problem of how to deal with the residual functions that need to be carried out after the Tribunals' closure. In the cases of the ICTY, ICTR and SCSL, the Security Council established the UN Mechanism for International Tribunals and the Residual Special Court for Sierra Leone to solve that issue. Tis thesis discusses the question of whether it was necessary to establish the UN Mechanism for International Tribunals or whether another solution might have been preferable. Obviously, this question was considered by scholars at the time when the Residual Mechanism was established. This thesis reconsiders the question in light of the case law and practice of the Residual Mechanism. The Residual Mechanism was established to operate for an initial period of four years. Unless the Security Council decides otherwise after reviewing the Residual Mechanism's work, it continues to operate for subsequent periods of two years. This thesis constitutes the first research of the entire legal framework and the case law of the Residual Mechanism. It is a contribution to legal literature and history. It provides an examination of different options for dealing with the residual functions, because it would still be possible to transfer those. One option would be to transfer the functions back to the domestic authorities of the affected countries. But, although judicial capacities have improved, issues still exist. Transferring these functions to other states would be difficult, because states are not willing or able to take over the Tribunals' functions. The option of an international body, such as the ICC taking over the functions would be impracticable because it would require amendments to the Rome Statute. Therefore, in order to demonstrate that the international legal system is working and to achieve a deterrent effect the Residual Mechanism is necessary. But this thesis also points out that it would have been a better option to create a joint mechanism including the ICTY, ICTR, and SCSL. Future ad hoc criminal tribunals requiring mechanisms with functions similar to those of the Residual Mechanism could be appended to it.

Table of Contents

Abbreviations

ACA	Advisory Committee on Archives
BIH	Bosnia and Herzegovina
BIH CPC	Criminal Procedure Code of Bosnia and Herzegovina
BIH Constitution	Constitution of Bosnia and Herzegovina
ECHR	European Convention on Human Rights
FIA	Freedom of Information Act
ICC	International Criminal Court
ICC RPE	Rules of Procedure and Evidence for the International Criminal Court
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTR RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY RPE	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia
ICTY Statute	Statute of the International Criminal Tribunal for the former Yugoslavia
IRMCT Statute	Statute of the Mechanism for the International Criminal Tribunals
IRMCT RPE	Rules of Procedure and Evidence of the Mechanism for the International Criminal Tribunals
IWGIT	Informal Working Group on International Tribunals
OSCE	Organisation for Security and Co-operation in Europe
RSCSL	Residual Special Court for Sierra Leone
Residual Mechanism	Mechanism for the International Criminal Tribunals
SCSL	Special Court for Sierra Leone
SCSL Statute	Statute of the Special Court for Sierra Leone
UN	United Nations

I. Introduction

Acting under Chapter VII of the UN Charter, the Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) to pursue violations of international humanitarian law during the conflict in former Yugoslavia and the Rwandan genocide. An international intervention was necessary because the national legal systems were not reliable. The war in former Yugoslavia is considered to be the most devastating conflict in Europe since the end of the Second World War, while the Rwandan genocide lasted only three months but resulted in the killing of hundreds of thousands of people. The ad hoc Tribunals were created to pursue alleged war criminals and bring lasting peace to the countries strongly battered by the crimes. But the Tribunals were created with a finite lifespan in mind. Furthermore, the Tribunals faced a problematically large financial burden. Hence, a conflict existed between the need to end impunity as a main goal on the one hand, and the finite lifespan as a main characteristic of the Tribunals on the other. The Special Court for Sierra Leone (SCSL) was created to prosecute persons responsible for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone during the Sierra Leone Civil War in 1996. The Civil War lasted 11 years and left over 50 000 dead. The Security Council was asked by the President of Sierra Leone to establish a court to bring justice and ensure lasting peace in Sierra Leone.

When developing the Tribunals' Completion Strategies, the Security Council was faced with the crucial question of how to deal with the cases of the remaining fugitives and other residual functions of the Tribunals that need to be carried out after the Tribunals' closure. The expression 'residual functions' describes the essential functions that go to the heart of the Tribunals' core business and their mandate. The control of the archives is equivalent to the symbolic and physical control of the past as well as the future.

With the adoption of Resolution 1966 (2010) on 22 December 2010, the Security Council took its most decisive step toward the closure of the Tribunals and established the UN Mechanism for International Criminal Tribunals (Residual Mechanism), formally referred to as the International Residual Mechanism for Criminal Tribunals. The Residual Mechanism is an international court mandated to continue the residual functions previously performed by the ICTY and the ICTR. It was created as a temporary, small, and efficient body. The Residual Mechanism started operating on 1 July 2012 in Arusha, United Republic of Tanzania, and on 1 July 2013 in The Hague, the Netherlands. While the Arusha branch continues the functions of the ICTR, The Hague branch continues functions of the ICTY. The Residual Mechanism operated in parallel with the Tribunals during the

initial years of the Residual Mechanism's existence and will continue to operate after the closure of the ICTY and ICTR. The ICTR closed on 31 December 2015 and the ICTY is expected to close at the end of 2017. The Residual Mechanism maintains the legacies of the two Tribunals. When Resolution 1966 (2010) was adopted, two remaining fugitives of the ICTY and nine remaining fugitives of the ICTR were still at large. One of the remaining ICTY fugitives was Ratko Mladić, who was considered one of the most prominent war criminals in former Yugoslavia. Therefore, the Security Council acknowledged the need for some kind of mechanism to continue the residual functions of the ICTY and the ICTR.

This thesis examines the research question of whether it was necessary to establish the Residual Mechanism or whether another solution might have been preferable. Obviously, this question was considered by scholars at the time when the Residual Mechanism was established. The Residual Mechanism has now been operational for five years. This thesis reconsiders the question in light of the case law and practice of the Residual Mechanism. The Residual Mechanism was established to operate only for an initial period of four years. Unless the Security Council decides otherwise after considering reviews of the progress of the Residual Mechanism's work, the Residual Mechanism continues to operate for subsequent periods of two years. It could be argued that transferring the Tribunals' functions to an already existent national or international body would have been a more reasonable option. Furthermore, although the Residual Mechanism has already been established, the Security Council could accelerate the progress of the Residual Mechanism's work by reducing the workload and transferring all or some of the functions. Hence, the costs of the Residual Mechanism could be reduced.

One possible solution could be a transfer of the functions to the national authorities of the affected countries. The affected countries include, in the case of the ICTR, the Republic of Rwanda, and in the case of the ICTY the Republic of Croatia, the Republic of Serbia, and Bosnia and Herzegovina. Since the Residual Mechanism was established the judicial capacities of the affected countries have probably improved and are therefore able to continue the residual functions. In addition, the affected countries are willing to carry out the residual functions. But particular residual functions, such as the prosecution of the remaining fugitives, the protection of victims and witnesses, or the management of the Tribunals' archives, require national authorities that are objective and impartial. On the one hand, it is questionable whether proper prosecution will take place and the rights of the accused will be safeguarded at a level deemed acceptable by the UN. But on the other

hand, a transfer to domestic courts could allow proceedings to be carried out closer to the victims and communities that have suffered from those events.

Another possible solution could be a transfer of the functions to external international bodies, like the International Criminal Court (ICC), or external national bodies of the UN member states. Regarding an external international body, it could be difficult to find a suitable international body that provides the capacity to continue the Tribunals' work or take over some of the functions. The ICC is a potential option because it would have the capacity to carry on the residual functions. However, it is questionable whether the Rome Statute of the ICC allows the ICC to take over the Tribunals' residual functions. It would be possible to transfer the residual functions to different international bodies. But the residual functions are closely linked, so the international bodies would need to cooperate very closely. An issue for external national bodies could be the lack of jurisdiction to bring the Tribunals' accused to trial. Further, it is questionable whether national bodies are wiling in general to continue the residual functions, since the Tribunals' residual functions require a significant amount of capacity.

When analysing the question of whether the establishment of the Residual Mechanism was the best option, the follow-up question appears to be whether it would have been a preferable option to create a joint Residual Mechanism, one that included the SCSL, the ICTY, and the ICTR. A joint Residual Mechanism could become a part of the international criminal justice landscape. Other Tribunals, including the Special Tribunal for Lebanon, could also transfer residual functions to the joint Residual Mechanism after their closure. In August 2010, the Residual Special Court for Sierra Leone (RSCSL) was created by an agreement between the UN and the government of Sierra Leone to solve the residual issues resulting from the closure of the SCSL. The RSCSL started its work after the SCSL was shut down. Although the SCSL is considered to be a hybrid tribunal it is more accurately classified with the ad hoc Tribunals because it is a creation of international law and not domestic law. But it is questionable whether the SCSL is compatible with the Tribunals due to the different legal basis. The Security Council established the Tribunals acting under Chapter VII of the UN Charter, while the SCSL was set up by way of an agreement between the government of Sierra Leone and the UN. This thesis explains the historical and political background of the SCSL. It describes the similarities and differences between the RSCSL and the Residual Mechanism in order to answer the question of whether a joint Residual Mechanism would be possible. This thesis outlines the residual functions of the RSCSL but does not provide an analysis of the Statute and the case law of the RSCSL. Since the thesis concentrates on the creation of the

Residual Mechanism, it does not require a detailed analysis of the Statute and case law of the RSCSL.

When closing the Tribunals, the challenge of the Security Council is to secure the legacy of the ICTY and the ICTR. It is necessary to ensure continuity between the Tribunals and the Residual Mechanism. In addition, a smooth transition of the Tribunals' functions is needed to ensure that the transfer is effective. When establishing the Residual Mechanism, the Security Council was faced with criticism regarding the slow progress of the Tribunals' work. Because of the criticism, the Security Council needed to provide appropriate provisions to make the Residual Mechanism more efficient while keeping the Residual Mechanism a small body. Therefore, the question arises as to whether the Security Council provided the Residual Mechanism with an adequate Statute and Rules of Procedure and Evidence to help keep the Residual Mechanism a small and efficient body. At the same time, the Statute and Rules of Procedure and Evidence need to ensure continuity between the Tribunals and the Residual Mechanism.

The relevant legal literature regarding the Residual Mechanism is still very limited, although the Tribunals were a frequent topic. The decisions made during the establishment of the Residual Mechanism will influence similar situations in the future. The solutions implemented regarding the Tribunals' closure will become a part of the international criminal justice landscape. In addition, it will shape the normative environment for future ad hoc tribunals. This thesis explains the political and historical background as well as problems that arose during the establishment of the Residual Mechanism. It constitutes the first research on the entire legal framework and the case law of the Residual Mechanism. It is a contribution to legal literature history. In the legal literature, it is the first examination concerning the problems that appeared in the case law of the Residual Mechanism, which are connected to the establishment of the Residual Mechanism and in which the transfer of the residual functions from the Tribunals to the Residual Mechanism are explained and analysed. Because the Residual Mechanism operates in parallel with the Tribunals, it is possible that conflicts will arise. When dealing with residual functions, future Tribunals will use the Residual Mechanism as an example. This thesis provides examinations of different options that can be considered when Tribunals plan their closure in the future, along with new perspectives gained by examining the outcomes of cases transferred to domestic courts. By examining the decisions of the domestic courts, the thesis provides a more specific answer to the question of whether it would have been possible to transfer the functions of the Tribunals to domestic authorities from the outset.

The methodology includes the research and review of relevant legal literature as well as reports and documents of the Tribunals, the Residual Mechanism and the Security Council. The Statutes as well as the Rules of Procedure and Evidence of the Tribunals and the Residual Mechanism were analysed and compared. This study includes examinations of the case law of the Tribunals and the Residual Mechanism as well as the case law of the national courts of the Republic of Rwanda, the Republic of Croatia, the Republic of Serbia, and Bosnia and Herzegovina.

This thesis consists of nine chapters. Following the introduction provided in Chapter One, Chapter Two summarises the political and historical background of the Tribunals' creation as well as the Tribunals' Completion Strategies. Chapter Three explains the establishment as well as the special nature of the Residual Mechanism and lists the residual functions. After determining the residual functions, Chapter Four answers the question of whether it would have been or still would be possible to transfer all or some of the residual functions to the national authorities of the affected countries. The national authorities need to be able to provide a legal framework to make the performance of the residual functions possible. It is necessary to ensure that the residual functions will be carried out in accordance with international standards, especially considering that the trial function, as the most important of the residual function, needs to be carried out properly. The national courts of the affected countries have already dealt with cases transferred by the ICTY or the ICTR. But it is questionable whether the national courts would be able to conduct unbiased proceedings involving fugitives belonging to the most senior leaders suspected of committing horrific crimes. In order to determine the ability of the national courts to conduct such proceedings, there follows an examination of the transferred cases and the corresponding monitoring reports. This will investigate whether the legal systems of the affected countries were sufficiently rebuilt to take over the Tribunals' trial function and are able to conduct unbiased proceedings for high-level fugitives.

Chapter Five examines the potential options for transferring the residual functions to external international bodies, like the ICC, including different options for the ICC to perform residual functions. Another option could be to transfer the residual functions to external national bodies of member states of the UN. This could reduce both the workload and costs of the Residual Mechanism.

Chapter Six examines the question of whether it would have been a preferable solution to establish a joint Residual Mechanism comprising the ICTY, the ICTR, and the SCSL in one. For this it is necessary to determine whether the SCSL is compatible with the Tribunals, and whether the legal framework allows for a joint Residual Mechanism.

Chapter Seven comprises an analysis of the Resolution 1966 (2010) and the Rules of Procedure and Evidence of the Residual Mechanism. Furthermore, it includes a comparison between the Statute and Rules of Procedure and Evidence of the Residual Mechanism and the Tribunals' Statutes and Rules of Procedure and Evidence. The normative environment of Residual Mechanism as well as the residual functions will be examined in detail. In addition, issues that appeared in the case law of the Residual Mechanism, which are connected to the establishment of the Residual Mechanism and the transfer of the residual functions from the Tribunals to the Residual Mechanism are explained and analysed in Chapter Seven. This chapter will also answer the question of whether the legal framework of the Residual Mechanism addresses the criticism expressed during the establishment of the Residual Mechanism regarding the slow progress of the Tribunals' work.

Chapter Eight examines one of the most important residual functions, the management and preservation of the Tribunals' archives. When considering how to deal with the residual functions that need to be carried out after the Tribunals' closure, the management and preservation of the Tribunals' archives was one of the most important questions on the table, especially as finding a future location for the archives proved to be difficult. The Tribunals' records include a great deal of confidential documents that need to be safeguarded. The archives exist to prevent historical revisionism in the affected countries, and hence it is very important that the historical record cannot be manipulated in order to suit regime interests. Finally, Chapter Nine concludes the thesis by summarising the findings and attempting to answer the research question.

II. The Ad Hoc International Criminal Tribunals

Acting under Chapter VII of the UN Charter the Security Council established the ICTY and the ICTR to pursue violations of international law during the Yugoslavian conflict and the Rwandan genocide. The intervention was necessary because the national legal systems were not working properly. The SCSL was set up by an agreement between the government of Sierra Leone and the UN. It was a result of the request of the Sierra Leonean government for a court to address serious crimes committed during the civil war.

1. The Conflicts in Former Yugoslavia, Rwanda and Sierra Leone

In 1993, the Security Council created the ICTY through Resolution 827 (1993) as a subsidiary organ in the sense of Article 7 (2) and Article 29 of the UN Charter.[1] Due to the multi-ethnic society in former Yugoslavia and the fact that flagrant violations of international humanitarian law had occurred, the intervention by the Security Council was required.[2] The history of the Yugoslavian state lasted only about 75 years.[3] Before the conflict started, the country was divided into the six sovereign republics of Slovenia, Croatia, Serbia, Montenegro, Macedonia, and Bosnia and Herzegovina (BIH), along with two autonomous regions, Vojvodina and Kosovo.[4] The people of Serbia, Croatia, Slovenia, Macedonia, and Montenegro were regarded as distinct nations. But the situation in BIH was unique, because there was no single ethnic majority, and furthermore there was no recognition of a distinct Bosnian nation.[5] The population of BIH has been multi-ethnic for centuries.[6] A main source of conflict between the ethnic groups has been religion. Although the major part of the population did not practice their religion because of the long years of oppression by the Communist regime, the majority of the Croatians remained Roman Catholic, the majority of the Serbians remained Orthodox, and the Bosnian Muslims also maintained their faith. The conflict that led to the establishment of the ICTY started in the beginning of the nineties with the collapse of the multinational state of

[1] UN Security Council Resolution 827 (1993), UN Doc. S/RES/827, 25 May 1993.
[2] Ibid., preamble.
[3] See more in: Andrew Bell-Fialkoff, 'A Brief History of Ethnic Cleansing' Foreign Affairs 72 (1993) 110; Florence Hartmann, 'Bosnia' in Roy Gutman and David Rieff (eds.), *Crimes of War: What the Public Should Know*, (W. W. Norton & Company, London 1999), p. 50; Herwig Roggemann, *Die Internationalen Strafgerichtshöfe* (2nd edn, Berlin Verlag, Berlin 1998), p. 337; Karl Arthur Hochkammer, 'The Yougoslav War Crimes Tribunal: The Compability of Peace' Vand. J. Transnat'l L. 28 (1995) 119; Marc Weller 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia' AJIL 86 (1992), 569; Michael Scharf *'Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg'* (Carolina Academic Press, Durham 1997) p.1; Waldemar Szulik 'The Conflict in Former Yugoslavia' Pol. Q. Int'l Aff 6 (1997), 87-89; Harriet Critchley 'The failure of federalism in Yugoslavia' International Journal XLVIII (1993) 434, 436- 439.
[4] Vojvodina and Kosovo were closely associated with Serbia.
[5] Cherif Bassioouni, Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers Inc. Irvington-on-Hudson, New York 1996), p.17*; Prosecutor v. Duško Tadić* (Case No. IT-94-1-T), Trial Chamber Opinion and Judgement, 7 May 1997, paras. 65- 69; Elihu Lauterpacht, C. J. Greenwood, A. G. Oppenheimer, *International Law Reports 160 Volume Hardback Set: International Law Reports* (Cambridge University Press, Cambridge 1999), p. 34.
[6] Until the outbreak of the armed confrontations the population consisted of Bosnian Muslims (47%), Serbians (33%), Croatians (17%), and others (3%).

Yugoslavia.[7] After three years of war and following the Dayton Peace Agreement, BIH was declared a state consisting of three ethnic groups: Bosnian Muslims, Croatians, and Serbians.[8] According to recent estimates, around 100 000 people were killed during the war, 20 000 to 50 000 women were raped,[9] and over 2.2 million people were displaced.[10] Thus, the Yugoslav wars are considered to be the most devastating conflict in Europe since the Second World War.[11]

In the case of Rwanda, the Security Council was asked by the Rwandan government to interfere when the Rwandan legal system was unable to pursue the massive violations of international humanitarian law that had occurred.[12] The Security Council created the ICTR on 8 November 1994 by adopting Resolution 955 (1994).[13] Like the ICTY, the Security Council created the ICTR as a subsidiary organ in the sense of Article 7 (2) and Article 29 of the UN Charter. It was created as a 'sister-tribunal' to the ICTY. Rwanda was the scene of a horrible ethnic genocide along with massive politically inspired massacres.[14] Before the conflict, the Hutu and Tutsi constituted a nation for about 400 years. They speak the same language and share a uniform culture and worldview.[15] The

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[7] For an overview of the conflict see: Michael Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg*, see note 3, p.1; Cherif Bassiouni, Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Publishers Inc. Irvington-on-Hudson, New York 1996), p. 5; Andrew Bell-Fialkoff, 'A Brief History of Ethnic Cleansing' Foreign Affairs 72 (1993) 110, 117; Saskia Hille 'Mutual Recognition of Croatia and Serbia (+Montenegro)' EJIL 6 (1995) 598, 599; David Clapham, *Slovenia. Housing Privatization in Eastern Europe* (Greenwood Publishing Group, Portsmouth 1996), p. 152; Ivana Nizich, Željka Markić and Jeri Laber 'Civil and Political Rights in Croatia' Human Rights Watch (1995), p. 26; Maire Braniff, *Integrating the Balkans: Conflict Resolution and the Impact of EU Expansion* (I.B. Taubris, New York 2011), pp. 55-56; Sandra Fabijanić Gagro and Budislav Jr. Vukas, 'The Path of the Former Yugoslav Countries to the European Union: From Integration to Disintegration and Back' Maastricht Journal of European and Comparative Law 19.2 (2012) 300, 308; Klejda Mulaj, *Politics of ethnic cleansing: nation-state building and provision of in/security in twentieth-century Balkans* (Lexington Books, Lanham 2008), p. 53; Philip Hammond, *Framing Post-Cold War Conflicts: The Media and International Intervention* (Manchester University Press, Manchester 2007), p. 51; Robert J. Donia, *Sarajevo: A biography* (The University of Michigan Press, Ann Arbor 2006), p. 284; Milos Nikolić, *The Tragedy of Yugoslavia- the rise, the reign, and the fall of Slobodan Milošević* (Nomos, Baden-Baden 2002), p. 51; Robert Heinsch, *Die Weiterentwicklung des humanitären Völkerrechts durch die Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda: Zur Bedeutung von internationalen Gerichtsentscheidungen als Rechtsquelle des Völkerrechts* (Berliner Wissenschafts- Verlag, Berlin 2007), p. 56; Drazen Petrović, 'Ethnic Cleansing - An Attempt at Methodology' EJIL 5 (1994) 342-359; Lutz Lehmler, *Die Strafbarkeit von Vertreibungen aus ethnischen Gründen im bewaffneten nicht- internationalen Konflikt: Zugleich ein Beitrag zur neueren Entwicklung des Völkerstrafrechts* (Nomos, Baden-Baden 1999), p. 109; *Prosecutor v. Duško Tadić* (Case No. IT-94-1-T), Trial Chamber Opinion and Judgement, 7 May 1997, paras. 55, 79, 84; *Prosecutor v. Zejnal Delalić et al,* (Case No. IT-962-1-T), Trial Chamber Judgement, 16 November 1998, paras. 91-119; *Letter dated 24 May 1994 from the Secretary-General to the President of Security Council,* UN Doc. S/1994/674, 27 May 1994, para. 26- 27.

[8] The presidents of Croatia, BIH and the Federal Republic of Yugoslavia as well as the representatives of the European Union and the Balkan Contact Group signed the Dayton Peace Agreement on 14 December 1995. Ronald Slye, 'The Dayton Peace Agreement: Constitutionalism and Ethnicity' YJIL 21 (1996) 470-473; Marcus Cox, 'The Right to Return Home: International Intervention and Ethnic Cleansing in Bosnia and Herzegovina' Int'l & Comp. L.Q. 47 (1998) 599- 612; Paul Szasz, 'The Dayton Accord: The Balkan Agreement' Cornell Int'l L.J. 30 (1997) 759-768; James Sloan, 'The Dayton Peace Agreement: Human Rights Guarantees and their Implementation' EJIL 7.2 (1996) 207-225; Fionnuala Ni Aolain, 'The Fractured Soul of the Dayton Peace Agreement: A Legal Analysis' Mich. J. Int'l L. 19.4 (1997-1998) 957-1004; Viktor Masenko-Mavi, 'The Dayton Peace Agreement and Human Rights in Bosnia and Herzegovina' HJLS 42.1-2 (2001) 53-68; Payam Akhavan, 'The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond' Hum. Rts. Q. 18.2 (1996) 259-285.

[9] The majority were Bosniak. Todd A. Salzman, 'Rape Camps as a Means of Ethnic Cleansing: Religious, Cultural, and Ethical Responses to Rape Victims in the Former Yugoslavia' Hum. Rts. Q. 20 (1998) 348-378.

[10] UN Resolution 820 (1993), UN Doc. S/RES/820 (1993), 17 April 1993. See also: *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, U.N. Doc. S/25704, 3 May 1993; Ronald Slye, 'The Dayton Peace Agreement: Constitutionalism and Ethnicity' YJIL 21 (1996) 459.

[11] Florence Hartmann, 'Bosnia' in Roy Gutman and David Rieff (eds.), *Crimes of War: What the Public Should Know*, (W. W. Norton & Company, London 1999), p. 50; *Miachel Harsch, The Power of Dependence: NATO-UN Cooperation in Crisis Management* (Oxford University Press, Oxford 2015) p. 37.

[12] UN Security Council Resolution 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994, preamble.

[13] Ibid.

[14] Filip Reyntjens, 'Rwanda: Genocide and Beyond' J Refug Stud (1996) 240, 240-251.

[15] See more in: Gérard Prunier, *The Rwanda Crisis: History of a Genocide* (2nd edn, C. Hurst & Co Publishers Ltd, London 1998), p. 16; Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda* (Princeton University Press, Princeton 2002), pp. 58- 69, 113; Jean-Pierre Chrétien (ed.), Scott Straus (trs), *The Great Lakes of Africa: Two Thousand Years of*

worst period of the conflict began on the 6 April 1994, when the presidential jet was shot down, killing President Habyarimana and other passengers.[16] This event marked the start of the following a mass murder, where the presidential guard started to kill opposition politicians and prominent people of the Tutsi population. At the beginning of the conflict, 84% of the population belonged to the Hutu, 14% to the Tutsi, and 2% to the Twa.[17] The Rwandan genocide lasted three months and hundreds of thousands of people were killed.[18] The Tutsi population was killed brutally, and no distinction was made between men, woman or children. During the conflict, more than 500 000 unarmed civilians were killed, and some accounts estimate that 800 000 to one million people died.[19] In July 1994, the Rwandan Patriotic Front became the military superior and captured Kigali on 4 July 1994.[20] The Rwandan Patriotic Front ended the war on 18 July 1994 and proclaimed a new government on the following day.[21]

From March 1991 to January 2002, Sierra Leone suffered a decade-long conflict marked by systemic and widespread violations of human rights and humanitarian law, where government armed forces and the pro-government Civil Defence Forces fought against two rebel groups, the Revolutionary United Front and the Armed Forces Revolutionary Council. Between 50 000 and 75 000 people were killed and almost half of the country's population was displaced. Atrocities were committed against civilians, including murder, torture, rape, the recruitment of child soldiers, and the burning of villages.[22] The civil war in Sierra Leone was one of the most brutal wars in recent memory.[23]

History (Zone Books, New York 2003), pp. 69-160; Learthen Dorsey, *Historical Dictionary of Rwanda* (The Scarecrow Press, Lenham 1994), p. 38; Hildegard Schüring, 'Rwanda: Hintergründe der Katastrophe. Opfer, Täter und die internationale Gemeinschaft' Vereinte Nationen (1994) 128; James Jay Carney, *Rwanda Before the Genocide, Catholic Politics and Ethnic Discourse in the Late Colonial Era* (Oxford University Press, Oxford 2013), pp. 124-127; Catherine Newbury, *The Cohesion of Oppression: Client ship and Ethnicity in Rwanda, 1860-1960* (The University of Chicago Press, New York 1988), pp. 195- 196; Paul J. Magnarella, 'Background and Causes of the Genocide in Rwanda' JICJ 3 (2005) 801-822; Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will be Killed With Our Families: Stories from Rwanda* (Picador, London 1999), pp. 56–57; Filip Reyntjens, 'Rwanda: Genocide and Beyond' J Refug Stud (1996) 240, 243-244; Christian L. Marlin, 'A Lesson Unlearned: The Unjust Revolution in Rwanda, 1959-1961' Emory Int'l L. Rev. 12.3 (1998) 1271, 1271-1330; Heiko Ahlbrecht, *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert* (Berliner Wissenschafts-Verlag, Berlin 1999), p. 304; *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR-96-4-T), Judgement, 2 September 1998, para. 82.

[16] *Letter dated 1 October 1994 from the Secretary-General addressed to the President of the Security Council,* UN Doc. S/1994/1125, 04.10.1994, para. 42.

[17] 'Ibid., para. 45; *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR-96-4-T), see note 15, para. 83.

[18] Ibid.

[19] Gérard Prunier, *The Rwanda Crisis: History of a Genocide*, see note 15, p. 265; Special Rapporteur of the Commission on Human Rights, Report 28 June 1994, UN Doc. E/CN.4/1995/7, para. 24.

[20] Dafna Gozani, 'Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms, and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court' Loy. L.A. Int'l & Comp. L. Rev. 36 (2015) 331, 351.

[21] *Prosecutor v. Jean Paul Akayesu* (Case No. ICTR-96-4-T), see note 15, para.110; William Schabas, *The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, New York 2006), p. 25.

[22] Sigall Horowitz, 'How International Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone' Israel Law Review 46(3) (2013), p. 355; Open Justice Society Initiative, 'Legacy: Completing the Work of the Special Court of Sierra Leone' (2011), p. 2; Human Rights Watch Report, 'Sierra Leone: Sowing Terror, Atrocities against Civilians in Sierra Leone' Vol. 10, No. 3 (A) (1998); Celina Schocken, 'Special Court for Sierra Leone: Overview and Recommendations' Berkley Journal of International Law Vol. 20:436 (2002), pp. 437- 441; Kathryn Howarth, 'The Special Court for Sierra Leone - Fair Trials and Justice for the Accused and Victims' International Criminal Law Review 8 (2008), pp. 400-401.

[23] See more on the conflict in Sierra Leone in Celina Schocken, 'Special Court for Sierra Leone: Overview and Recommendations' Berkley Journal of International Law Vol. 20:436 (2002), pp. 437- 442; Babafemi Akinrinade, International Humanitarian Law and the

2. Establishing the ICTY and the ICTR

The Security Council was very concerned about the massive violations of international humanitarian law that had taken place, including mass killings, the systematic detention and rape of women, and ethnic cleansing.[24] Acting under Chapter VII of the UN Charter, the Security Council established the ICTY by unanimously adopting Resolution 827 (1993) in May 1993.[25] The Statute of the International Criminal Tribunals for the former Yugoslavia (ICTY Statute) was found as an Annex to Resolution 827 (1993).[26] With this Resolution the Security Council reaffirmed all previous resolutions concerning the conflict in Yugoslavia, including Resolution 713 (1991), which was the first resolution concerning the breakup of Yugoslavia.[27]

The ICTY was the first international war crimes tribunal since the Nuremburg and Tokyo Tribunals. It marked an important step in the history of international criminal law. By 2000, the ICTY was working on several trials, convicting defendants who played

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Conflict in Sierra Leone, 15 Notre Dame J.L. Ethics & Pub. Pol'y 391 (2001), pp. 392- 405; Ian Smillie, Lansana Gberie and Ralph Hazelton, 'The Heart of the Matter: Sierra Leone, Diamonds, and Human Security' (Partnership Africa Canada, 2000), pp. 8- 65: Lydia Nkansah, ' A Dance of Truth and Justice in Post conflict Peace building in Sierra Leone' African Journal of International and Comparative Law 23.2 (2015), pp. 199-225.

[24] Scholars and non-governmental organisations, like Amnesty International, Human Rights Watch, International Human Rights Law Group and Centre for Reproductive Law and Policy published reports. See: Human Rights Watch 'War Crimes in Bosnia-Herzegovina' (1993); Henry Siegman, 'The Holocaust Analogy is Too True: A Muslim People Are Targeted for Extinction, and the West Turns Away' Los Angles Times (11 July 1993); Ben Macintyre, 'Hawkish Albright Driven by Family History' The Times (6 April 1999); Anne Bodley, 'Weakening the Principle of Sovereignty in International Law: the International Tribunal for the Former Yugoslavia' N.Y.U. J. I INT'L L. & POL. 31 (1999) 417, 418; Susan Brownmiller, 'Making Female Bodies the Battlefield' in Alexandra Stiglmayer (ed.) *Mass Rape. The War against Women in Bosnia-Herzegovina* (University of Nebraska Press, Lincoln and London 1994), p. 26; Beverley Allen, *Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia* (University of Minnesota Press, Minneapolis 1996), p.13; Mirko Klarin, 'Nuremberg Now!' Borba (1991), translation in Antonio Cassese (ed) 'The Path to The Hague, Selected Documents on the Origins of the ICTY. The Hague, ICTY. Document 7, pp. 35- 36; Galina Nelaeva, 'Establishment of the International Criminal Tribunal in the Former Yugoslavia (ICTY): Dealing with the War Raging at the Heart of Europe' RJEA 11.1 (2011) 103, 104; UN Commission on Human Rights, *Report on the Situation of Human Rights in the Territory of the Former Yugoslavia Submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Right*s, UN Doc. A/48/92-S/25341, 14 August 1992, p. 20; Gideon A. Moor, 'The Republic of Bosnia-Herzegovina and Article 51: Inherent Rights and Unmet Responsibilities' Fordham Int'l L.J. 18 (1994) 870, 888-889.

[25] UN Security Council Resolution 827 (1993), see note 1. Some permanent members like China and the Russian Federation felt that the Security Council did not have the legal authority to establish a Tribunal. See Michael Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg*, see note 3, pp. 37-49; Michael Scharf and Margaux Day, 'The ad hoc international criminal tribunals, Launching a new era of accountability' in William Schabas and Nadia Bernaz (eds.), *Routledge Handbook of International Criminal Law* (Routledge, Taylor & Francis Group, Abingdon und New York 2011) p. 51; James Crawford, 'The Work of the International Law Commission' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary' Volume I* (Oxford University Press, Oxford 2002), p. 23; Christopher Greenwood, 'The international Tribunal for Former Yugoslavia' International Affairs (1993) 641, 647; Timothy Mak, 'The Case against an International War Crimes Tribunal for the Former Yugoslavia' International Peacekeeping 2 (1995) 536, 536-563; David Forsysthe, 'Politics and the International Tribunal' Criminal Law Forum 5 (1994) 415; Galina Nelaeva, 'Establishment of the International Criminal Tribunal in the Former Yugoslavia (ICTY): Dealing with the War Raging at the Heart of Europe' RJEA 11.1 (2011) 105; Daphna Shraga and Ralph Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' EJIL 5 (1994) 2; Helpful documents for the Secretary-General were submitted by the OSCE, France, Italy, Brazil, Canada, Organisation oft he Islamic Conference, Mexico, the Netherlands, the Russian Federation, Slovenia, the United States, the International Committee oft he Red Cross, Amnesty International and the Lawyers Committee for Human Rights. Morris and Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia: A Documentary History and Analysis* (Irvington-on-Hudson, New York: Transnational Publishers, 1995), pp. 211- 310, 363-462; *Letter dated 16 February 1993 from the Permanent Representative of Italy to the United Nations addressed to the Secretary-General,* UN Doc. S/25300 (1993); *Letter dated 6 April 1993 from the Permanent Representative of Brazil to the United Nations addressed to the Secretary-General,* UN Doc. S/25540 (1993); *Letter dated 13 April 1993 from the Permanent Representative of Canada to the United Nations addressed to the Secretary- General,* UN Doc. S/25594 (1993); *Note verbale dated 12 March 1993 from Permanent Representative Mission of Mexico to the United Nations addressed to the Secretary-General,* UN Doc. S/25417 (1993); *Note verbale dated 30 April 1993 from Permanent Representative of the Netherlands to the United Nations addressed to the Secretary-General,* UN Doc. S/25716 (1993); *Letter dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General,* UN Doc. S/25537 (1993); *Letter dated 20 April 1993 from the Permanent Representative of Slovenia to the United Nations addressed to the Secretary-General,* UN Doc. S/25652 (1993); *Letter dated 5 April 1993 from the Permanent Representative of the United States to the United Nations addressed to the Secretary-General,* UN Doc. S/25575 (1993).

[26] UN Security Council Resolution 827 (1993), see note 1, preamble.

[27] UN Security Council Resolution 808 (1993), UN Doc. S/RES/808 (1993), 22 February 1993; Magdalena M. Martín Martínez *National Sovereignty and International Organizations* (Kluwer Law International, The Hague 1996), p. 279.

leadership roles during the war, and had a budget of well over $100 million per annum.[28] At the end of 2016, proceedings against seven accused were still on going, including six accused before the Appeals Chamber[29] and one at trial.[30] The ICTY indicted 161 persons for serious violations of international humanitarian law in the area of former Yugoslavia.[31] According to the recent Completion Strategy Report, the ICTY plans to close its doors in December 2017.[32]

Eighteen months after the adoption of Resolution 827 (1993), the Security Council adopted Resolution 955 (1994) by which it decided to 'establish an international tribunal for the purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and similar violations committed in the territory of neighbouring states'.[33] The establishment of the ICTR was a reaction to the killings of Tutsi and moderate Hutu men, women, and children.[34] The Statute of the International Criminal Tribunal for Rwanda (ICTR Statute) was annexed to Resolution 955 (1994). The ICTR Statue was adopted under Chapter VII of the UN Charter and corresponds to the Statute of the ICTY, though with some deviations.[35]

Before the closing of the ICTR, the Tribunal indicted 93 persons for genocide and other serious violations of international humanitarian law. [36] Three cases were transferred to Rwanda[37] and two cases to France.[38] The ICTR was always smaller in scale than the ICTY and has not achieved the same high profile, which has been reflected in the Tribunal's budget.

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[28] William Schabas, *The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone*, see note 21, p. 24.
[29] One case: Jadranko Prlić, Bruno Stojić, Slobodan Praljak, Milivoj Petković, Valentin Ćorić and Berislav Pušić.
[30] One case: Ratko Mladić.
[31] Figures of the Cases see the Website of the ICTY, http://www.icty.org/en/cases/key-figures-cases, (last visted on 27 March 2017).
[32] *Assessment and report of Judge Carmel Agius, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) covering the period from 17 November 2015 to 17 May 2016,* UN Doc. S/2016/454, 17 May 2016, para. 6; *Letter dated 17 November 2016 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council,* UN Doc. S/2016/976, 17 November 2016, para. 7.
[33] UN Security Council Resolution 955 (1994), see note 12. The Resolution was adopted with one dissenting vote from Rwanda and one abstention, from China. China was troubled with the fact that a Security Council mandated body was interfering into internal matters of a sovereign state. William Schabas, *The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone*, see note 21, p. 29.
[33] See more on the legitimacy and legality of the Tribunal in Daphna Shraga and Ralph Zacklin, 'The International Criminal Tribunal for the Former Yugoslavia' EJIL 5 (1994) 505.
[34] *Preliminary report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994),* UN Doc. S/1994/1125, Annex, 4 October 1994, paras. 146-149; UN Security Council Resolution 935 (1994), UN Doc. S/RES/935 (1994), 1 July 1994, para. 1; Lyal Sunga, 'The Commission of Experts on Rwanda and the Creation of the International Criminal Tribunal for Rwanda' Human Rights Law Journal 16 (1995) 121; *Letter dated 1 October 1994 from the Secretary-Genral addressed tot he President oft he Security Council,* UN Doc. S/1994/1125, 4 October 1994, p. 2; *Report on the situation of human rights in Rwanda prepared by the Special Rapporteur of the Commission on Human Rights in accordance with Commission resolution S-3/1 and Economic and Social Council decision 19941223, UNSC*, UN Doc. A/49/508-S/1994/1157 (1994), Annex I, para. 75.
[35] See more on the legitimacy and legality of the Tribunal in Daphna Shraga and Ralph Zacklin 'The International Criminal Tribunal for the Former Yugoslavia' EJIL 5 (1994) 505.
[36] Key Figures of the Cases see the Website of the ICTR,
http://unictr.unmict.org/en/cases/key-figures-cases, (last visited on 27 March 2017).
[37] *Prosecutor v. Bernhard Munyagishari* (Case No. ICTR-05-89); *Prsosecutor v. Ladislas Ntaganzwa* (Case No. ICTR-96-9); *Prosecutor v. Jean Uwinkindi* (Case No. ICTR-01-75).
[38] *Prosecutor v. Wenceslas Munyeshyaka* (Case No. ICTR-05-87); *Prosecutor v. Laurent Bucyibaruta* (Case No. ICTR-05-85).

A. The Temporary Character as a Main Characteristic of the Tribunals

The Security Council created the ICTY and ICTR with the idea of a finite lifespan.[39] But the limited lifespan raised two separate but interrelated challenges regarding the residual issues and legacy of the Tribunals. Residual issues include the tasks of ongoing legal and moral responsibilities to those directly affected by the Tribunals after their closure.[40] Legacy is the lasting impact of a court, including the extent to which a court has had a deterrent effect. In addition, legacy should be the basis for future efforts to prevent a recurrence of crimes.[41] It builds up trust in international judicial processes.

Despite the idea of a finite lifespan, the Tribunals' existence was linked to the purpose of restoring and maintaining international peace and security in the territories of former Yugoslavia and Rwanda. According to the Secretary-General's report presenting the Security Council with the draft Statute of the ICTY, 'the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia and Security Council decisions related thereto'.[42] The Tribunals were established to pursue alleged war criminals, but at the same time the Tribunals were intended to serve as a deterrent for further crimes during the conflict. Another objective was to bring justice to the people of a country destroyed by a horrible war.[43] Holding proper criminal trials helped to create historical records of the atrocities. Furthermore, it was important to prevent the glorification of the war criminals as heroes. Together, all of these objectives served the major aim of bring lasting peace and reconciliation to the countries strongly battered by the horrific crimes. But it is impossible to accomplish all of the described aims as long as the main goal to end impunity has not been reached because in this case the Tribunals would lose their deterrent effect. Hence, a conflict existed between the need to end impunity as a main goal on the one hand and the finite lifespan as a main characteristic of the Tribunals on the other.

B. Shutting Down the Tribunals: Completion Strategy

The materials concerning the creation of the Tribunals give little guidance as to when the work to be completed. In 2000, the ICTY began to discuss the issue of concluding when it became clear that a completion strategy was necessary to conclude the mandate of the

[39] Thomas Wayde Pittman, 'The Road to the Establishment of the International Residual Mechanism for Criminal Tribunals From Completion to Continuation' JICJ 9 (2011), 797, 798; Guido Acquaviva, 'Best Before the Date Indicated:Residual Mechanisms at the ICTY' in Albertus Henricus Joannes Swart, Alexander Zahar, Göran Sluiter (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, Oxford 2011), p. 5; Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 171.

[40] Caitlin Reiger, 'Where to From Here for International Tribunals? Considering Legacy and Residual Issues' International Canter for Transitional Justice (2009) 1.

[41] Ibid.

[42] *Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993),* see note 10, para. 28.

[43] Donald Riznik, 'Completing the ICTY-Project without Sacrificing its Main Goals- Security Council Resolution 1966 – A Good Decision?' GoJIL 3 (2011) 907, 909.

Tribunals. Beside the cases that were tried in the early days of the ICTY and were not completed, the pendency of new cases increased. The capacity of the Tribunal was limited, and because of the accumulation of old and new cases the ICTY started to struggle. Between 1997 and 2003, a couple of reforms were introduced in order to reduce the workload of the Tribunals by shortening pre-trial and trial proceedings.[44] In letters dated 12 May and 14 June 2000, the President of the ICTY, Judge Claude Jorda, and the President of the ICTR, Judge Navanethem Pillay, mentioned the closure of the Tribunals to the Secretary-General Kofi Annan for the first time.[45] Both recommended an increase in the number of judges and the establishment of a pool of ad litem judges in order to conclude the work of the Tribunals at the earliest date possible.[46]

On 5 December 2000, the Security Council issued Resolution 1329 (2000), which included measures to speed up proceedings by improving the Rules of Procedures and Evidence and authorising the appointment of ad litem judges.[47] Furthermore, the Resolution explained two approaches to bring the Tribunals to an end; Firstly, to try civilian, military, and paramilitary leaders suspected of being most responsible for crimes rather than minor actors; and secondly, to give power to the Trial Chamber in deciding whether to transfer a case involving intermediate- and lower-level accused to competent national courts.[48] These two approaches are the main components of the Completion Strategy. The amendment of the ICTY Statute was a result of the need of both Tribunals to 'expedite the conclusion of their work at the earliest possible date'.[49] In the eighth annual report of the ICTY, Judge Jorda informed the Security Council and the General Assembly that the international community would welcome the completion of the Tribunals.[50] In 2002, the ICTY presented a Completion Strategy, which stated that the ICTY would wrap up its investigations by the end of 2004, complete all trials at first instance in 2008, and complete all work by the end of 2010.[51] The Security Council confirmed the agreement

[44] Máximo Langer & J. W. Doherty, 'Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms' YJIL 36 (2011) 2, 241, 247-253; *Ninth Annual Report of the ICTY President Claude Jorda*, UN Doc. A/57/379- S/2002/985, 04 September 2002, para. 37; *Tenth Annual Report of the ICTY President T. Meron*, UN Doc. A/58/297-S/2003/829, 20 August 2003, paras. 13-16; See also Fausto Pocar, 'Completion or Continuation Strategy? – Appraising Problems and Possible Developments in Building the Legacy of the ICTY' JICJ 6 (2008) 4, 655, 657; Dominic Raab, 'Evaluating the ICTY and its Completion Strategy – Efforts to Achieve Accountability for War Crimes and their Tribunals' JICJ 3 (2005) 1, 82, 84.

[45] *Letter dated 12 May 2000 from the President of the ICTY*, UN Doc. A/55/382-S/2000/865 (2000), Annex I; *Letter dated 14 June 2000 from the President of the ICTR,* UN Doc. A/55/382-S/2000/865 (2000), Annex II.

[46] UN Security Council Resolution 1329 (2000), UN Doc. S/RES/1329 (2000), 5 December 2000, preamble.

[47] Ibid.

[48] Ibid.; N. Piacente 'Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy' JICJ 2 (2004) 3, 446; Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 183.

[49] UN Security Council Resolution 1329 (2000), see note 43.

[50] The international community supported the plans to complete the Tribunals mandates by submitting a total of 64 candidates for the pool of ad litem judges, although only 54 were required.

[51] *Letter dated 17 June 2002 from the Secretary-General addressed to the President of the Security Council*, UN Doc. S/2002/678, 19 June 2002, p. 5.

regarding the Completion Strategy.[52] However, the ICTR took longer to accept a completion strategy, and only in 2002 did the Security Council authorise ad litem judges for the ICTR.[53] The ICTR developed a Completion Strategy with the plan to complete its mandate by 2007 or 2008.[54]

On 28 August 2003, the UN Security Council issued the first resolution treating the Completion Strategies of the ICTY and ICTR jointly. It called upon the Tribunals to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008 and to complete all work by the end of 2010.[55] Furthermore, according to Resolution 1503 (2003), the Secretary-General decided to split the positions of the Prosecutor of the ICTY and ICTR so that each Tribunal would have separate Prosecutors.[56] This measure was intended to improve the effectiveness of the Tribunals. On 26 March 2004, the Security Council issued Resolution 1534 (2004), which underlined the importance of fully adopting the Completion Strategies and thereby reconfirmed Resolution 1503 (2003).[57] Following Resolution 1534 (2004) the Tribunals amended Rule 11bis of their Rules of Procedure and Evidence to allow the referral of cases regarding accused individuals who were subject to a confirmed indictment. In addition, these accused individuals need to be considered appropriate for transfer to national courts depending on the gravity of the crimes charged and their level of responsibility.[58] According to Rule 11bis of the ICTY Rules of Procedure and Evidence (ICTY RPE)[59] and 11bis of the ICTR Rules of Procedure and Evidence (ICTR RPE),[60] the President of the Tribunals may appoint a bench of three permanent judges selected from the Trial Chambers, the so-called Referral Bench, which not only takes into consideration the gravity of the crimes described in the indictment, but also whether the national jurisdiction is able to provide a fair trial.[61] Pursuant to Rule 11bis (D) (IV), the Prosecutor is responsible for monitoring the national

[52] *Statement by the President of the Security Council,* UN Doc. S/PRST/2002/21, 23 July 2002; UN Security Council Resolution 1503 (2003), UN Doc. S/RES/1503 (2003), 28 August 2003, preamble.
[53] UN Security Council Resolution 1431 (2002), UN Doc. S/RES/1431 (2002), 14 August 2002.
[54] *Seventh Annual Report of the ICTR,* UN Doc. A/57/163–S/2002/733, 2 July 2002, paras. 22-23.
[55] UN Security Council Resolution 1503 (2003), see note 52, para. 7; UN Security Council Resolution 1512 (2003), UN Doc. S/RES/1512 (2003), 27 October 2003, preamble; *Letter dated 29 September 2003 from the President of the ICTR E. Møse addressed to the Secretary-General*, UN Doc. S/2003/946, 3 October 2003.
[56] UN Security Council Resolution 1503 (2003), see note 52, para. 7; UN Security Council Resolution 1512 (2003), UN Doc. S/RES/1512 (2003), 27 October 2003, para. 8.
[57] The President of the Security Council would later state that Resolution 1534 (2004) 'emphasized the importance of fully implementing the completion strategies'. *Statement by the President of the Security Council*, UN Doc. S/PRST/2008/47 (2008), 19 December 2008, p. 1.
[58] Rule 11 bis (C) of the ICTY RPE; Daryl Mundis, 'The Judicial Effects of the "Completion Strategies" on the Ad Hoc International Criminal Tribunals' AJIL 99 (2005) 142, 147; L. D. Johnson, 'Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity' AJIL 99 (2005) 158, 159; *Prosecutor v. Gojko Janković* (Case No. IT-96-23/2-AR11bis.2), Decision on Rule 11 bis Referral, 15 November 2005, para. 5; Olympia Bekou, 'Rule 11 BIS: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence' Fordham Int'l L.J. 33 (2009) 723, 791; Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008)169, 176; Donald Riznik, 'Completing the ICTY-Project without Sacrificing its Main Goals- Security Council Resolution 1966 – A Good Decision?' GoJIL 3 (2011) 907, 912; Giovanna M. Frisso, 'The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims' GoJIL 3 (2011) 1039, 1097.
[59] ICTY Rules of Procedure and Evidence, UN Doc. IT/32/Rev. 43, 14 March 1994.
[60] ICTR Rules of Procedure and Evidence, UN Doc. ITR/3/REV.1 (1995), 29 June 1995.
[61] Rule 11 bis (B) of the ICTY RPE.

court proceedings of the referred cases. For example, the Organisation for Security and Co-operation in Europe (OSCE) agreed to co-operate with the Office of the Prosecutor and to monitor the war crimes cases.[62]

The time following Resolution 1534 (2004) was a period marked by unprecedented tribunal activity.[63] But even though the Trial Chambers were working at full capacities, it became apparent as time went by that the Tribunals would not be able to finish their work by the end of 2010. According to Riznik, a reason for this delay was found in 'the fact that the measures implanted to speed up proceedings did not have the expected effect on reducing the length of the proceedings.'[64] Therefore, several Security Council Resolutions the initial deadlines for both Tribunals were postponed year after year.[65] In November 2007, the President of the ICTR reported to the Security Council that, considering the current projections, the Tribunal might not be able to dispose of all cases by December 2008. He reiterated this position in May 2008, indicating that some of the cases tried by the ICTR would, at best, be completed in the first half of 2009 with sentences delivered in the second half of 2009.[66] In its final report the ICTR Tribunal plan was to close by the end of 2015, which also happened.[67]

3. Establishing the SCSL

In response to the atrocities committed during the Balkan wars and the Rwandan genocide, the Security Council established the ad hoc Tribunals under Chapter VII of the UN Charter.[68] But because of the number of structural, administrative and financial problems, a discussion emerged concerning whether there was a more efficient and cheaper justice model to end impunity for international crimes.[69] Therefore, a model similar in form,

[62] Decision No. 673, Co-operation Between the Organization for Security and Co-operation in Europe and the International Criminal Tribunal for the former Yugoslavia, 19 May 2005, (PC.DEC/673) at http://www.osce.org/pc/14887?download=true, (last visited on 11 April 2017).

[63] By the time of its 16th Annual Report, for example, the ICTY's three Trial Chambers were functioning at full capacity, running up to eight trials simultaneously in its three courtrooms. See: *Sixteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/64/205-S/2009/394, 31 July 2009, para 3; Thomas Wayde Pittman, 'Establishment of the International Residual Mechanism for Criminal Tribunals From Completion to Continuation' JICJ 9 (2011) 797, 805.

[64] Donald Riznik, 'Completing the ICTY-Project without Sacrificing its Main Goals- Security Council Resolution 1966 – A Good Decision?' GoJIL 3 (2011) 907, 913; Maximo Langer and Joseph W. Doherty, 'Managerial Judging Goes International, but Its Promise Remains Unfulfilled: An Empirical Assessment of the ICTY Reforms' Yale J. Int'l L. 36 (2011) 241, 252-278.

[65] UN Security Council Resolution 1993 (2011), UN Doc. S/RES/1993 (2011), 29 June 2011.

[66] *Report on the completion strategy of the International Criminal Tribunal for Rwanda,* UN Doc. S/2007/676, 20 November 2007, para. 57.

[67] *Report on the completion of the mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015,* UN Doc. S/2015/884, 17 November 2015, para. 5.

[68] Resolution 713 (1991), UN Doc. S/RES/827 (1993), 25 May 1993; UN Security Council Resolution 955 (1994), see note 12.

[69] Ralph Zacklin, 'The Failings of Ad Hoc International Tribunals' JICJ 2 (2004) 541, 545; Suzanne Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor' Harv. Hum. Rts. J. 16 (2003) 246; Sarah M.H. Nouwen, 'Hybrid courts' The hybrid category of a new type of international crimes courts' Utrecht L. Rev. 2 (2006) 190; Laura Dickinson, 'The Relationship between Hybrid Courts and International Courts: The Case of Kosovo' New Eng. L. Rev. 37 (2003) 1059, 1060; Javaid Rehman *International Human Rights Law* (2nd ed, London, Longman, 2009), p. 760.

substance and international legitimacy to the ad hoc tribunals needed to be developed.[70] A new generation of courts has been created, which are commonly referred to as the 'hybrid', 'mixed' or 'internationalised' tribunals.[71] These mixed tribunals have the characteristics of national as well as international tribunals. The model of hybrid courts 'endeavours to combine the strengths of the ad hoc tribunals with the benefits of local prosecutions.'[72]

The SCSL was created to prosecute persons responsible for serious violations of international humanitarian law and Sierra Leonean law committed in Sierra Leone during the Sierra Leone Civil War in 1996. The conflict started when the Revolutionary United Front, supported by the special forces of Charles Taylor's National Patriotic Front of Liberia, intervened in Sierra Leone and attempted to overthrow the Joseph Momoh government.[73] The Civil War began on 23 March 1991, lasted 11 years, and left over 50 000 dead. Although the SCSL is a 'close relative of the hybrid tribunals, it is more accurately classified with the ad hoc tribunals, because it is a creature of international law, not domestic law'.[74] The precise legal nature of the SCSL was questioned in the case against the former President of Liberia, Charles Taylor, who insisted on absolute immunity from criminal prosecution and argued that the SCSL was without jurisdiction because it did not derive its authority from Chapter VII of the UN Charter and thus would be characterised as a national court.[75] The Special Court Appeals Chamber characterised the institution as an international criminal court, as it declared in its judgement:[76]

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[70] Daphna Shraga, 'The Second Generation UN-Based Tribunals: A Diversity of Mixed Jurisdiction in Internationalized Criminal Courts and Tribunals Sierra Leone, East Timor, Kosovo and Cambidia' in Cesare P.R. Romano, André Nollkaemper, and Jann K. Kleffner (eds.) *International Criminal Courts* (Oxford University Press, Oxford 2004), p. 15.

[71] Also known as 'hybrid (criminal) courts/tribunals', 'mixed courts/tribunals', 'internationalized (criminal) courts/ tribunals', 'mixed domestic-international tribunals', 'hybrid domestic-international courts', 'semi-internationalized criminal courts/tribunals', 'internationalized domestic courts/ internationalized domestic tribunals' or 'mixed international/national institutions'. Laura Dickinson, 'The Relationship between Hybrid Courts and International Courts: The Case of Kosovo' New Eng. L. Rev. 37 (2003) 1059, 1060; Alain Pellet, 'Internationalized Courts: Better than Nothing ...' in Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner (eds.) *International Criminal Courts* (Oxford University Press, Oxford 2004), p. 439; D. Orentlicher, 'The Future of Universal Jurisdiction in the New Architecture of Transitional Justice' in Stephan Macedo (ed.) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes* (University of Pennsylvania Press, Philadelphia 2003), pp. 214-239; *The rule of law and transitional justice in conflict and post-conflict societies,* UN Doc. S/2004/616, 23 August 2004; Anotnio Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight against International Criminality' in Cesare P.R. Romano, André Nollkaemper, and Jann K. Kleffner (eds.) *International Criminal Courts* (Oxford University Press, Oxford 2004), pp. 3-13; William Burke-White, 'Regionalization of International Criminal Law Enforcement: A Preliminary Exploration' Tex. Int'l L. J. 38 (2003) 729, 730; William Burke-White, 'A Community of Courts: Towards a System of International Criminal Law Enforcement' Mich. J. Int'l L. (2002) 3; Suzannah Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' Criminal Law Forum (2001), p. 231.

[72] Szanne Katzenstein, 'Hybrid Tribunals: Searching for Justice in East Timor' Harv. Hum. Rts. J. 16 (2003) 245; Laura Dickinson, 'Transitional Justice in Afghanistan: The Promise of Mixed Tribunals' Denv. J. Int'l L. & Pol'y 31 (2002) 23, 42; Laura Dickinson, 'The Promise of Hybrid Courts' AJIL 97 (2003) 295, 310; Laura Dickinson, 'The Relationship between Hybrid Courts and International Courts: the Case of Kosovo' New Eng. L. Rev. 37 (2003) 1059, 1060; Laura Dickinson, 'Accountability for War Crimes: What Roles for National, International, and Hybrid Tribunals?' Am. Soc'y Int'l. L. Proc. 98 (2004) 181, 182; Rosanna Lipscomb, 'Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan' Colum. L. Rev. 106 (2006) 182, 212; Frederic Mégret, 'Symposium: Milosevic & Hussein on Trial: Panel 1: Global or Local Justice: Who Should Try or Ousted Leaders?: In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice' Cornell Int'l L.J. (2005) 725, 751; Sylvia de Bertodano, 'Current Developments in Internationalized Courts' JICJ (2003) 226, 244; Suzannah Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' Criminal Law Forum (2011) 185, 246, Suzannah Linton, 'Prosecuting Atrocities at the District Court of Dili', Melb. J. Int'l L. (2001) 414, 458; Suzannah Linton, 'Rising from the Ashes: The Creation of a Viable Criminal Justice System in East Timor' Melb. J. Int'l L. (2001) 122, 180.

[73] Lansana Gberie, *A Dirty War in West Africa The RUF and the Destruction of Sierra Leone* (Indiana University Press, Bloomington 2006), p. 6.

[74] William Schabas *The UN International Criminal Tribunals: The former Yugoslavia, Rwanda, and Sierra Leone* (Cambridge University Press, Cambridge 2006) p. 6.

[75] *Prosecutor v. Charles Taylor* (Case No. SCSL.2003.01.1), Decision on Immunity from Prosecution, 31 May 2004, para. 6.

[76] Ibid, para. 42.

'The constitutive instruments of the court contain indicia too numerous to enumerate to justify that conclusion. To enumerate those indicia will involve virtually quoting the entire provisions of those instruments. It suffices that having adverted to those provisions, the conclusion we have arrived at is inescapable.'

The Statute of the SCSL was drafted in October 2000, after President Kabbah requested that the Security Council establish a 'strong and credible court that will meet the objectives of bringing justice and ensuring lasting peace' in Sierra Leone.[77] The SCSL was set up by way of an agreement between the government of Sierra Leone and the UN. Thus, negotiations for a court for Sierra Leone began because of the invitation by the government of Sierra Leone.[78] Therefore, some authors pointed out the contrast of the SCSL to the Tribunals by explaining that both Tribunals were 'imposed' upon rather than 'requested' by the countries involved.[79] The Statute was adopted and came into force on 16 January 2002.[80] However, unlike the ICTY and ICTR, which were established by resolutions of the Security Council and constituted as subsidiary organs of the UN, the SCSL was established by an agreement between the UN and the government of Sierra Leone. Therefore, the SCSL is a treaty-based sui generis court of mixed composition and jurisdiction.[81] The agreement needed to be incorporated into the national law of Sierra Leone. Thus, the Parliament of Sierra Leone enacted the Special Court Agreement (Ratification) Act, which provides the legal framework for the court.[82] The applicable law includes international as

[77] *Letter from the Permanent Representative of Sierra Leone to the President of the UN Security Council,* UN Doc. S/2000/786, 9 August 2000, p. 2; Kathryn Howarth, 'The Special Court for Sierra Leone - Fair Trials and Justice for the Accused and Victims' Int'l Crim. L. Rev. 8 (2008) 401; Celina Schocken, 'Special Court for Sierra Leone: Overview and Recommendations' BJIL 20 (2002) 437, 442; Sarah M.H. Nouwen, 'Hybrid courts' The Hybrid Category of a New Type of International Crimes Courts' Utrecht L. Rev. 2 (2006) 195; John Cerone, 'The Special Court for Sierra Leone: Establishing a New Approach to International Criminal Justice' ILSA ILSA J. Int'l & Comp. L. 8 (2002) 379. Robert Cryer, 'A 'Special Court" for Sierra Leone?' Int'l & Comp. L.Q. (2001) 435, 446, Suzannah Linton, 'Cambodia, East Timor and Sierra Leone: Experiments in International Justice' Criminal Law Forum (2011) 185, 246; Abdul Tejan-Cole, 'The Special Court for Sierra Leone: Conceptual Concerns and Alternatives' Afr. Hum. Rts. L.J. (2001) 107, 126; Nsongurua Udombana, 'Globalization of Justice and the Special Court for Sierra Leone's War Crimes' Emory Int'l L. Rev. (2003) 55, 132; Jeanna Webster, 'Sierra Leone – Responding to the Crisis, Planning for the Future: The Role of International Justice in the Quest for National and Global Security', Ind. Int'l & Comp. L. Rev. (2001) 731, 777.

[78] Vincent Nmehielle and Charles Chernor Jalloh, *International Criminal Justice: The Legacy of the Special Court for Sierra Leone* (The Fletcher Forum of World Affairs Journal, 2006), p. 107; Defna Gozani, 'Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court' Loy. L.A. Int'l & Comp. L. Rev. 36 (2015) 357; Sigall Horowitz, 'How International Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone' Isr. L. Rev. 46 (2013) 355.

[79] Kristin Xueqin Wu, 'Experiences that Count: A Comparative Study of the ICTY and SCSL in Shaping the Image of Justice' Utrecht L. Rev. 9 (2013) 69; Celina Schocken, 'Special Court for Sierra Leone: Overview and Recommendations' BJIL 20 (2002) 437, 443; Kathryn Howarth, 'The Special Court for Sierra Leone - Fair Trials and Justice for the Accused and Victims' Int'l Crim. L. Rev. 8 (2008) 401.

[80] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone [Sierra Leone], 16 January 2002; Sarah M.H. Nouwen, ''Hybrid courts' The Hybrid Category of a New Type of International Crimes Courts' Utrecht L. Rev. 2 (2006) 200.

[81] *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone,* UN Doc. S/2000/915, 4 October 2000, para. 9; Sarah M.H. Nouwen, 'Hybrid courts' The Hybrid Category of a New Type of International Crimes Courts' Utrecht L. Rev. 2 (2006) 200.

[82] Sierra Leone: Act No. 9 of 2002 Special Court Agreement, 2002 (Ratification) Act, 2002 [Sierra Leone], 25 April 2002; The Supreme Court of Sierra Leone concluded that Section 11(2) provides that the Special Court for Sierra Leone is independent of the national judiciary. Sesay, Kondewa & Fofana-v-The President of the SCSL, The Registrar oft he SCSL, The Prosecutor of the SCSL and The Attorney General and Minister of Justice, Supreme Court of Sierra Leone SC No. 1/2003; William Schabas *The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, New York 2006), p. 39.

well as Sierra Leonean law. The hybrid institutional characteristics include staffing of all organs of the court by national and international personnel.[83]

According to Article 1 (1) of the SCSL Statute, the Court has 'the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996'. Another hybrid characteristic is that the SCSL derives its subject-matter jurisdiction from international and national law. Articles 2-4 of the SCSL Statute define the subject-matter jurisdiction for international crimes, including crimes against humanity, other serious violations of international humanitarian law, and violations of Article 3 common to the Geneva Convention and Additional Protocol II. Further, Article 5 of the SCSL Statute allows the SCSL to prosecute persons under the Prevention of Cruelty to Children Act, 1926, and the Malicious Damage Act, 1861. According to Article 8 of the SCSL Statute, the SCSL and the national courts of Sierra Leone have concurrent jurisdiction.[84] The SCSL also has primacy over the national courts of Sierra Leone, and it may at any stage of the procedure formally request a national court to defer to its competence.[85] However, the primacy of the SCSL is limited to the national courts of Sierra Leone and does not extend to the courts of third states. The SCSL also lacks the power to request the extradition of an accused person from any third state and to induce the compliance of its authorities with any such request.[86] The SCSL was the first of the Tribunals to close. The judgement of Charles Taylor brought all judicial activities of the Special Court to an end. By the end of 2012, the SCSL had indicted thirteen people and convicted nine, including the first sitting African head of state to be convicted, Charles Taylor. In December 2013, as part of its successful completion of its mandate, the SCSL formally handed over the SCSL's landmark courthouse to the government of Sierra Leone.[87]

[83] Alberto Costi 'Hybrid Tribunals as a Valid Alternative to international Tribunals for the Prosecution of International Crimes' 3rd Annual Victoria University Symposium on Human Rights (2005), p. 18.
[84] Article 1 (1) of the SCSL Statute.
[85] Article 1 (2) of the SCSL Statute.
[86] Article 7 of the ICTR Statute, Article 8 of the ICTR Statute; Article 8 of the ICTY Statute, Article 9 of the ICTY Statute; Article 13 of the Rome Statute; Article 12 (1) (a) of the SCSL Statute.
[87] Gabriel Oosthuizen and Robert Schaeffer, 'Complete justice: Residual functions and potential Residual Mechanisms of the ICTY, ICTR and SCSL' HJJ 3 (2008) 48, 49; Sarah M.H. Nouwen, 'Hybrid courts' The Hybrid Category of a New Type of International Crimes Courts' Utrecht L. Rev 2 (2006) 196.

III. Establishing the Residual Mechanism

Closing a criminal court is not a usual affair and certain legal and practical obligations of the Tribunals will necessarily continue beyond their closure. These are legal and ethical obligations of the Tribunals, the Security Council, and the UN. With the adoption of Resolution 1966 (2010) on 22 December 2010 the Security Council took its most decisive step to date toward the closure of the Tribunals.

1. Plans to Establish the Residual Mechanism

A series of significant steps led to the creation of the Residual Mechanism. In September 2007, the ICTY and ICTR submitted an informal joint paper to the Security Council identifying the potential residual functions of the Tribunals. The Tribunals' joint paper explained why the different residual functions needed to continue beyond the closure of the Tribunals.[1] In addition, the Tribunals established an Advisory Committee on Archives (ACA), which had the mandate to provide an analysis of how best to ensure the future accessibility of the archives. The ACA, chaired by Justice Richard Goldstone, submitted a report on the archives of the Tribunals. [2] The Tribunals' informal joint paper and the report of the ACA provided a basis for dialogue between the Informal Working Group on International Tribunals (IWGIT) and the Tribunals during 2007 and 2008, helping the IWGIT understand the residual functions.[3] The IWGIT was established in June 2000 to cope with specific legal issues related to the Tribunals. It was an informal body and consisted of legal advisers of the members of the Security Council. The IWIGIT is not a decision-making body, but it conducts substantive consideration of the issues and makes recommendations directly to the Security Council. The IWGIT was asked to create appropriate instruments to enable the future Residual Mechanism to perform the residual functions of the Tribunals.[4]

In a statement on 19 December 2008, the President of the Security Council noted with concern the fact that the Tribunals would not be able to complete their work by the end of 2010 due to the complexity of certain cases and the late arrest of certain accused persons. But he also pointed out that 'the Security Council reaffirms the necessity of

[1] Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 185; *Assessment and report of Judge Fausto Pocar, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council Resolution 1534 (2004),* U.N. Doc. S/2007/663, 12 November 2007.

[2] *Report on the Completion Strategy of the International Criminal Tribunal for Rwanda delivered to the Security Council*, U.N. Doc. S/2007/676, 20 November 2007, para. 53; Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 185.

[3] Brigitte Benoit Landale and Huw Llewellyn, 'The International Residual Mechanism for Criminal Tribunals: The Beginning of the End for the ICTY and ICTR' Int'l Org. L. Rev. 8 (2011) 349, 350.

[4] Ibid., p. 351. UN Security Council Resolution 1534 (2004), UN Doc. S/RES/1534 (2004) of 26 March 2004.

persons indicted by the ICTY and ICTR being brought to justice.'[5] For the first time, a statement of the Security Council's President contained a formal pronouncement of the need for an ad hoc residual mechanism to continue the most important functions of the ICTY and the ICTR.[6] 'The Security Council acknowledges the need to establish an ad hoc residual mechanism to carry out a number of essential functions of the Tribunals, including the trial of high-level fugitives, after the closure of the Tribunals. In view of the substantially reduced nature of these residual functions, this residual mechanism should be a small, temporary, and efficient structure. Its functions and size will diminish over time.'[7] The residual mechanism would derive its authority from a Security Council Resolution as well as from Statutes and Rules of Procedure and Evidence based on those already existing for the Tribunals, but with appropriate modification.[8]

In 2008, the IWGIT produced, in cooperation with the UN Office of Legal Affairs, the first draft elements for a resolution and began abstract discussions, which resulted in the beginnings of a negotiation process. In 2009, the IWGIT requested that the UN Office of Legal Affairs produce a series of detailed non-papers on each of the residual functions.[9] In order to allow the IWGIT to accomplish this request the Secretary-General was asked to report on the administrative and budgetary aspects of the options for possible locations for the seat of the future residual mechanism and the Tribunals' archives.[10] Thereafter, the UN Office of Legal Affairs drafted the Secretary-General's report of 21 May 2009.[11]

Based on the information in the non-papers and the IWGIT discussions, the Secretary-General's report made several recommendations for some of the main characteristics of a possible residual mechanism for the Tribunals.[12] This report aimed to further and facilitate the work of the IWGIT. Besides the requested information regarding the location of the seat of the Residual Mechanism and the archives, the report also deals with other issues that may occur while establishing the Residual Mechanism. The IWGIT members agreed to a Residual Mechanism with a trial 'capacity based on a roster of judges; that it be small, temporary and efficient, and made up of a small staff reflective of reduced functions following completion of the work of the Tribunals; and to a lesser extent, that its Statute be

[5] *Statement by the President of the Security Council,* UN Doc. S/PRST/2008/47,19 December 2008.
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Brigitte Benoit Landale and Huw Llewellyn, 'The International Residual Mechanism for Criminal Tribunals: The Beginning of the End for the ICTY and ICTR' Int'l Org. L. Rev. 8 (2011) 349, 351.
[10] Thomas Wayde Pittman, 'Establishment of the International Residual Mechanism for Criminal Tribunals From Completion to Continuation' JICJ 9 (2011) 797, 807.
[11] Secretary-General's *Report on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals*, UN Doc. S/2009/258, 21 May 2009; *Statement by the President of the Security Council,* UN Doc. S/PRST/2008/47,19 December 2008.
[12] Ibid.

based on amended ICTY and ICTR Statutes.'[13] But the report also identifies the remaining issues, which still had to be resolved: (a) Identifying the residual functions that could be transferred to the Residual Mechanism; (b) Establishing one or two residual mechanisms and where to locate them; (c) Whether the resolution should determine an explicit date on which the Residual Mechanism will commence working or whether that date should be determined later depending on the Tribunals' progress towards completion; (d) Whether the jurisdiction of the Residual Mechanism should extend to all fugitives or only to some of the indictees, and, if the latter, how to guarantee that there is no impunity for the remaining indictees; (e) Whether the Residual Mechanism should have the authority to refer cases to national authorities and would the Residual Mechanism have the authority to revoke referrals, or any referrals previously made by the Tribunals; (f) What the structure of the Residual Mechanism should be, including how to elect the judges of the Residual Mechanism; and finally (g) Where to locate the archives, including the question of whether the archives should be co-located with the Residual Mechanism.[14]

The Security Council would primarily rely on this document when later issuing Resolution 1966 (2010), which established the Residual Mechanism.[15] This Resolution not only established the Residual Mechanism and its two branches, it also adopted the Statute and made it subject to specific transitional arrangements. However, while establishing the Residual Mechanism a major challenge was to strike a balance between the need to respect due process and fairness on the one side and efficiency and cost-effectiveness on the other.

2. Nature of the Residual Mechanism

The Mechanism for International Criminal Tribunals is formally referred to as the International Residual Mechanism for Criminal Tribunals. According to Acquaviva, the expression Residual Mechanism is used to describe 'the set of means and procedures to deal with functions' that were carried out by Tribunals, but which will be needed after the Tribunals have completed all judicial work.[16] One option was that the Residual Mechanism could be a 'downsized tribunal'.[17] But the IWGIT recommended a different approach, in particular that as many of the residual functions as possible should be transferred to the affected countries rather than transferred to a Residual Mechanism, because the Tribunals

[13] Ibid., para. 7.
[14] Ibid., para. 8.
[15] UN Security Council Resolution 1966 (2010), UN Doc. S/RES/1966 (2010), 22 December 2010; Thomas Wayde Pittman, 'Establishment of the International Residual Mechanism for Criminal Tribunals From Completion to Continuation' JICJ 9 (2011) 797, 805.
[16] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY' in Albertus Henricus Joannes Swart, Alexander Zahar, Göran Sluiter (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, Oxford 2011), p. 1.
[17] Hwu Llewellyn 'The Security Council's Consideration of the Establishment of Residual Mechanisms for the International Criminal Tribunals' ASIL 104 (2010), 41.

were always intended to be temporary and were created in a situation where the affected countries were unable or unwilling to prosecute cases.[18] Therefore, the Security Council considered that the Residual Mechanism should be a small and efficient new institution and not a downsized continuation of the ICTY and ICTR.[19] However, according to Landale and Llewellyn, the Residual Mechanism could be regarded as a 'downsized tribunal'.[20] This opinion is appropriate, because the Residual Mechanism has the same three-organ structure and continues all of the essential residual functions of the ICTY and ICTR, including judicial activities, witness protection, and the management of the archives.

The Security Council, acting under Chapter VII of the UN Charter established the Residual Mechanism to restore international peace and security.[21] The main goal of the Residual Mechanism 'is to ensure that the closing of the Tribunals will not result in impunity for those responsible for serious violations of international humanitarian law.'[22] A Residual Mechanism, however, could have the potential 'to create a safe space within which those traumatised by their experiences may overcome them`.[23] Because the residual issues refer to the enduring tasks of legal and moral obligations to the affected individuals, the Residual Mechanism continues the objectives of the Tribunals, including important responsibilities regarding matters of life or death and the protection of fundamental human rights.

3. The Residual Functions

While implementing the completion strategies it became clear that a number of functions exist that need to be carried out after the closure of the Tribunals, the so-called 'residual functions', which go to the heart of the core business of the Tribunals and their mandate.[24] The expression 'residual functions' describes the essential functions of the ICTY and the ICTR that need to be carried out after the Tribunals have completed their mandate.[25] But the expression 'residual functions' does not particularly convey the sense that these are

[18] Secretary-General's Report, see note 11; *Statement by the President of the Security Council,* UN Doc. S/PRST/2008/47,19 December 2008, paras. 109-110.
[19] Ibid.; Brigitte Benoit Landale and Huw Llewellyn, 'The International Residual Mechanism for Criminal Tribunals: The Beginning of the End for the ICTY and ICTR' Int'l Org. L. Rev. 8 (2011) 349, 352.
[20] Ibid., p. 354.
[21] Ibid., p. 351.
[22] Dafna Gozani, 'Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms, and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court' Loy. L.A. Int'l & Comp. L. Rev 36 (2015) 331, 338; Catherine Denis, 'Critical Overview of Residual Functions' of the Residual Mechanisms and its Date of Commencement (including Transitional Arrangements)' JICJ 9 (2011) 819, 820.
[23] Leila Nadya Sadat, 'The Legacy of the International Criminal Tribunal for Rwanda' Whitney R. Harris World Law Institute, 3 July 2012, p. 18; Dafna Gozani, 'Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms, and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court' Loy. L.A. Int'l & Comp. L. Rev 36 (2015) 331, 338.
[24] Article 2 of the IRMCT Statute; Gabriel Oosthuizen and Robert Schaeffer, 'Complete justice: Residual functions and potential Residual Mechanisms of the ICTY, ICTR and SCSL' HJJ 3 (2008) 48, 50.
[25] Secretary-General's Report, see note 11, para. 5; Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY' in Albertus Henricus Joannes Swart, Alexander Zahar, Göran Sluiter (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, Oxford 2011), p. 6.

crucial ongoing obligations of the international community. Some of those obligations concern life-or-death matters and fundamental human rights. According to Acquaviva, it would have been a better option to choose a more suitable term in order to transport the sense of continuity and on-going support by the international community to domestic jurisdictions.[26] However, the expression 'residual functions' has been established and is widely used.

In September 2007, the ICTY and the ICTR jointly submitted a report to the UN Office of Legal Affairs explaining twelve essential functions that need to be carried out at the international level after their closure. The aim was to ensure the continuity of the work between the Tribunals and the Residual Mechanism.[27] According to the Residual Mechanism's website, the number of essential functions was downscaled to nine.[28] The content and the work involved in these functions are precisely described in the report of the Secretary-General on the 'administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the Residual Mechanism(s) for the Tribunals', issued on 21 May 2009.[29] Five of the functions are ad hoc in nature and only temporary:

- Tracking and prosecution of the remaining fugitives
- Conducting Retrials
- Conducting and completing all appellate proceedings
- Conducting proceedings for review of final judgement
- Conducting Trials for contempt cases and false testimony

Another four functions are continuing and require day-to-day follow- up and management:

- Protection of victims and witnesses
- Supervision of enforcement of sentences
- Assistance to national jurisdictions
- Management and preservation of the archives

These nine functions were identified as the essential functions that need to be continued out after the Tribunals' closure.

[26] Ibid., Gabriel Oosthuizen and Robert Schaeffer, 'Complete justice: Residual functions and potential Residual Mechanisms of the ICTY, ICTR and SCSL' HJJ 3 (2008) 48, 50.
[27] These document and correspondence are not publicly available. However, references thereto and a part of the contents can be found in other documents. See Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council Resolution 1534 (2004), UN Doc. S/2008/729, 24 November 2008, Annex I, para. 40; Secretary-General's Report, see note 11, para. 9.
[28] IRMCT Website, http://www.unmict.org/en/about (last visited on 11 April 2017); Giorgia Tortora, 'The Mechanism for International Criminal Tribunals: A Unique Model and Some of Its Distinctive Challenges' ASIL Insight 21, 6 April 2017, https://www.asil.org/insights/volume/21/issue/5/mechanism-international-criminal-tribunals (last visited on 30 May 2017).
[29] Secretary-General's Report, see note 11, paras. 17- 59.

4. Legality of the Residual Mechanism

The question arises as to whether the creation of Residual Mechanism falls within the power of the Security Council under Chapter VII of the UN Charter. The use of enforcement measures requires, for example, a 'threat to the peace', 'breach of peace', or 'act of aggression, according to Article 39 of the UN Charter. The conflict in former Yugoslavia and the Rwandan genocide required a measure under Chapter VII of the UN Charter. However, the current situation in the affected countries does not constitute a threat to international peace and security any longer. According to Happold, the existence of a specific situation mentioned in Article 39 of the UN Charter is required to justify the action taken under Chapter VII.[30] But when the Residual Mechanism was created, the Security Council reaffirmed the determination to combat impunity 'and the necessity that all persons indicted by the ICTY and ICTR are brought to justice.'[31] However, this affirmation justifies the Security Council for acting under Chapter VII of the UN Charter, although no contemporary threat to peace exists in the affected countries. Galand argues that the context in which Resolution 1960 (2010) was adopted displays an agreement of the Security Council members to act under Chapter VII of the UN Charter.[32] But Nolte argues that an enforcement measure under Article 39 of the UN Charter would be ultra vires if a majority of the Security Council members approved the measure, even though no contemporary threat to peace exists.[33] According to Galand, the fight against impunity can trigger the power of the Security Council under Article 41 of the UN Charter.[34] Galand is correct, because if the Tribunals had been closed down without any form of mechanism to conduct trials for crimes committed in former Yugoslavia and Rwanda, Security Council's aim to end impunity would have been jeopardised. But Galand argues that a resolution under Chapter VI of the UN Charter could have possibly been sufficient to allow the Residual Mechanism to perform most of its residual functions.[35] However, residual functions regarding the conduct of a criminal trial required all states to cooperate. It was necessary to oblige the states to provide judicial assistance to the Residual Mechanism. Therefore, the Residual Mechanism needs to be a measure under Chapter VII of the UN Charter in order to be able to acquit and convict all remaining fugitives.

[30] Mattew Happold, 'Security Council Resolution 1373 and the Constitution of the United Nations' Leiden J Intl L 16 (2003) p. 602.
[31] UN Security Council Resolution 1966 (2010), see note 15, para. 6.
[32] Alexandre Skander Galand,'Was the Residual Mechanism's creation falling squarely within the Chapter VII power of the Security Council?' QIL 40 (2017), p. 12.
[33] Georg Nolte, 'The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections' in M Byers (ed.) *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford University Press, Oxford 2001), p. 316.
[34] Alexandre Skander Galand,'Was the Residual Mechanism's creation falling squarely within the Chapter VII power of the Security Council?' QIL 40 (2017), p. 13.
[35] Ibid, p. 18.

IV. Transferring the Residual Functions to the National Authorities of the Affected Countries

The question appears of whether there was still need for the Security Council to interfere where the domestic legal systems were sufficiently rebuilt to take over the work of the Tribunals. It is questionable whether it would have been a better option to transfer the residual functions to national authorities instead of establishing the Residual Mechanism. 'Transfer' involves the completely handing over of responsibilities concerning a particular residual function.[1] Although the Residual Mechanism already exists, it still could be possible to transfer a residual function to national authorities of the affected countries in order to reduce the workload of the Residual Mechanism.

1. Tracking and Prosecution of the Remaining Fugitives

The prosecution of the remaining fugitives is the most important residual function. And holding international trials is very expensive. But it is questionable whether national jurisdictions would be able to conduct trials in accordance with international fair trial standards. Whether transferring the trial function to domestic courts would be more efficient is controversial in the legal literature.[2] According to Acquaviva, it would be difficult to justify keeping open an expensive international tribunal when the other judicial activities diminish over time just for the eventuality that the remaining high-level fugitives may be apprehended.[3] The remaining fugitives could envision prosecution before a domestic court.[4] The Tribunals were established as temporary organs and are ad hoc in nature, the reason being that the national jurisdictions of the affected regions were not able to carry out proceedings at that time.[5] But the judicial capacity of these regions has improved since the end of conflicts in the affected areas. Therefore, it would be possible to consider transferring residual functions to national jurisdictions. Moreover, transferring functions regarding the prosecution of the remaining fugitives to national authorities could be seen as the restoration of the national jurisdiction.[6] The national authorities should have performed these functions from the beginning but were not able to do so. Although the original national authorities are no longer existent new domestic judiciaries have emerged

[1] Gabriël Oosthuizen, 'Draft Briefing Paper: The residual functions of the UN international criminal tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone: the potential role of the International Criminal Court' (2008) International Criminal Law Services, para. 27 (xi).
[2] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY' in Albertus Henricus Joannes Swart, Alexander Zahar, Göran Sluiter (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, Oxford 2011), p. 8; Gabriel Oosthuizen and Robert Schaeffer, 'Complete justice: Residual functions and potential Residual Mechanisms of the ICTY, ICTR and SCSL' HJJ 3 (2008) 48, 50.
[3] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 2, p. 8.
[4] Ibid.
[5] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016*, UN Doc. S/2016/453, 17 May 2016, paras. 75-76.
[6] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 2, p. 8.

in their place. According to Acquaviva, the following principle needs to remain valid: 'criminal proceedings are normally dealt with at the national level.'[7] In addition, domestic trials would be less expensive than holding international trials, because the need for translators or travel of witnesses to travel to and from the Tribunals would be lessened and proceedings would rely on existing local administration and infrastructure. But various NGOs and individuals have expressed criticism regarding the idea of fugitives escaping justice or not being tried in The Hague.[8] According to Acquaviva, it can be argued that the UN, by giving the ICTY primacy over national courts, assumed responsibility only for ensuring that trials take place but not that they are carried out by a particular international body.[9]

According to Acquaviva, because the start date of the Residual Mechanism's judicial activities would be uncertain, the support staff for a 'dormant' Residual Mechanism could become expensive in the long term.[10] Therefore, pretrial activities could have a form of virtual courtroom where the Residual Mechanism does not detain the accused. This 'virtual courtroom' would work on an electronic platform operated by the Registry in order to ensure disclosure and other obligations before trial proceedings begin. The real courtroom would only be necessary for traditional trial activities or status conferences.[11] Another possible approach could be to use domestic courts with an international component, such as the Special War Crimes Chamber in the State Court of BIH. The Special War Crimes Chamber functions in part with the help of international assistance by prosecutors, judges, other legal experts, and international financial contributions.[12] The domestic solution could be based on the premise that an international body monitors the work done by domestic courts. That would ensure international standards for the prosecutorial and defence activities carried out. It would be plausible, because the Residual Mechanism is already responsible for monitoring cases referred to national courts through international or national bodies. However, 'dormant' is a misnomer because the other residual functions would be active even if there were no trial activity. In terms of merely budgetary aspects, referral to national jurisdictions would indeed be a preferable approach. But considering due process standards and fairness regarding all concerned persons, trials of the remaining fugitives at an international level are

[7] Ibid., p. 9.
[8] Gabriel Oosthuizen and Robert Schaeffer, 'Complete justice: Residual functions and potential Residual Mechanisms of the ICTY, ICTR and SCSL' HJJ 3 (2008) 48, 55.
[9] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 2, p. 16.
[10] Ibid.
[11] Ibid.
[12] Ibid.

necessary.[13] This indicates the significance of international trials even if the UN is faced with a potentially expensive option.

According Oosthuizen and Schaeffer, the option to let the high-level accused face justice before national courts would raise issues.[14] In the case of Rwanda, there were concerns as to whether the high-level accused would receive fair trials. According to Oosthuizen and Schaeffer, the Residual Mechanism is necessary to be able to urge national and international authorities to apprehend accused persons at large, request and arrange for their transfer into custody, and prosecute and try them fairly and expeditiously.[15] The Residual Mechanism must have the capacity and authority to conduct trials and appeals proceedings regarding the high-level fugitives who cannot or should not be tried by national courts in former Yugoslavia, Rwanda, or elsewhere. Transfer to domestic courts would allow the proceedings to occur closer to the victims and communities that have experienced the events in question. But when the ICTY Prosecutor met victims' groups in Sarajevo these groups were bitter about the Completion Strategy because they believe that all high-level cases needed to be tried in The Hague. These victims see the Tribunal as a promise of justice and a concrete sign that the international community cares about their suffering. They think it would be unjust to envisage closing the Tribunal without completing its task successfully. In their minds, Karadžić and Mladić were the two persons most responsible for the genocide, war crimes, and crimes against humanity committed in BIH. According to the victims, there is no place other than The Hague to try them.[16] This shows that although proceedings before domestic courts would be closer to the victims and communities that have experienced those events, the victims still prefer that the fugitives be tried before an international body. For many, the importance of these cases has to be respected by trying those persons responsible for the atrocities at an international level.

At the time the Residual Mechanism, was created a powerful signal was sent to the countries where the remaining fugitives were hiding as well as to the entire world community. The symbolic impact of ending impunity must not be underestimated. With the establishment of the Residual Mechanism, the Security Council sent a powerful message to the remaining fugitives from the ICTR: that they cannot escape justice. This signalled recognition of the importance of the Tribunals' work over the last decades and an acknowledgement of the victims' suffering.

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[13] Ibid.
[14] Gabriel Oosthuizen and Robert Schaeffer, 'Complete justice: Residual functions and potential Residual Mechanisms of the ICTY, ICTR and SCSL' HJJ 3 (2008) 48, 55.
[15] Ibid.
[16] *Progress report of the Prosecutor of the International Residual Mechanism for Criminal Tribunals, Serge Brammertz, for the period from 16 November 2015 to 15 May 2016,* UN Doc. UN Doc. S/2016/453, Annex II, 17 May 2016, para. 6.

A. Review of the Transferred Cases of the Ad Hoc Tribunals

In order to decide whether it would have been an option to transfer this particular residual function to national jurisdiction it is necessary to examine the transferred cases in detail. The handling of the transferred cases indicates the ability of the national jurisdictions to conduct trials in accordance with international fair trial standards. The Tribunals were hesitant to refer cases to national jurisdictions of the affected countries. The ICTY transferred eight cases, and the ICTR transferred five.[17]

a. Transferred Cases of the ICTY

The ICTY referred eight cases against 13 accused persons to national jurisdictions of BIH, Croatia, and Serbia.[18] The cooperation with Croatia regarding war crimes cases was described as efficient and professional.[19] In 2003, the Croatian parliament adopted the legislation that transferred the jurisdiction to investigate and try war crimes cases to four county courts in Zagreb, Rjeka, Split and Osijek.[20] Lengthy delays occurred in several cases at all stages of the procedure at county courts as well as at the Supreme Court of Croatia. According to the Human Rights Watch Report issued in October 2004, patterns observed in war crimes trials in Croatia include issues regarding a 'hugely disproportionate number of cases being brought against the ethnic Serb minority, some on far weaker charges than cases against ethnic Croats.'[21] A significant differential between Serbs and Croats was observed in the rate of conviction and acquittal.[22] Convictions of ethnic Serbs existed where the evidence did not support the charges.[23] The OSCE Mission to Croatia

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[17] Figures of the Cases see the Website of the ICTY, http://www.icty.org/en/cases/key-figures-cases, (last visited on 27 March 2017); Key Figures of the Cases see the Website of the ICTR, http://unictr.unmict.org/en/cases/key-figures-cases, (last visited on 27 March 2017).

[18] Transferred to BIH: *Prosecutor v. Gojko Janković* (Case No. IT-96-23/2-PT), Decision on Rule11 bis Referral, 15 November 2005, para. 5; *Prosecutor v. Paško Ljubičić* (Case No: IT-00-41-PT), Decision to Refer the Case to Bosnia and Herzegovina pursuant to Rule 11 bis, 12 April 2006; *Prosecutor v. Mitar Rašević and Savo Todović* (Case No. It-97-25/1-PT), Decision on Referral of Casue Under Rule 11bis, 8 July 2005; *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević* (Case No. Case No. IT-02-65-PT), Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 bis, 30 July 2005; *Prosecutor v. Milorad Trbić* (Case No. IT-05-88/l-PT), Decision on Referral of Case Under Rule 11 bis, 27 April 2007; *Prosecutor v. Radovan Stanković* (Case No. IT-96-23/2-PT), Decision on Referral of Case Under Rule 11 bis, 17 May 2005; Transferred to Croatia: *Prosecutor v. Rahim Ademi and Mirko Norač* (Case No. Case No.: IT-04-78-PT) Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis, 14 September 2005; Transferred to Serbia: *Prosecutor v. Vladimir Kovačević* (Case No. IT-01-42/2-1), Decision on Referral of Case Pursuant to Rule 11 bis, 17 November 2006.

[19] *Twentieth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/68/255-S/2013/463, 2 August 2013, para. 56; *Nineteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/67/214-S/2012/592, 1 August 2012, para, 77; *Thirteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN Doc. A/61/271-S/2006/666, 21 August 2006, para. 78; *Prosecutor v. Ante Gotovina and Mladen Markač* (Case No. IT-06-90-A), Judgement', 16 November 2012; *Eighteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991,* UN Doc. A/66/210-S/2011/473, 31 July 2011, paras. 65-66; *Sixteenth annual report of the International Criminal Tribunal for the Former Yugoslavia covers the period from 1 August 2008 to 31 July 2009*, UN Doc. A/64/205-S2009/394, 31 July 2009, para. 65.

[20] OSCE, Supplementary Report: 'War Crime Proceedings in Croatia And Findings From Trial Monitoring' 22 June 2004, p. 5.

[21] Human Rights Watch 'Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina and Serbia and Montenegro' Volume 16, No 7 (D), October 2004, p. 2.

[22] OSCE, Supplementary Report, see note 20, p. 20.

[23] Ibid., p. 7; Milena Sterio 'Seeking the best Forum to Prosecute International War Crimes: Proposed Paradigms and Solutions' Florida Journal of International Law (2006), p. 891; Article 20 of the ICTR Statute; 'to be tried in his or her presence, and to defend himself or

pointed out that there is a considerable lack of impartiality amongst parts of the judiciary. The proceedings relied primarily on witness testimony, but reliability issues appeared regarding the reliability when trials concerned Croat defendants. The predominantly supportive atmosphere in which war crimes trials against Croats were conducted influenced witnesses.[24] Witnesses reported being threatened by former high-ranking army officials.[25] Therefore, the parliament enacted the Croatian Witness Protection Act, which entered into force in January 2004. [26] When transferring the first and only case to Croatia concerning Rahim Ademi and Mirko Norač, the Referral Bench concluded that under the Croatian Witness Protection Act the arrangements for witness availability and witness protection in Croatia are sufficient to ensure a fair trial.[27] According to the Referral Bench, the measures are comparable to those applied at the ICTY, ranging from relocation of witnesses, non-disclosure of the witnesses' identity, use of pseudonyms, and use of image and voice distortion during testimony. Further, the Referral Bench concluded that minor differences exist between the law as applied by the Tribunal and the law as applied by the Croatian Court. However, appropriate provisions exist to address most of the criminal acts of the accused, and the Croatian legal system provides an adequate penalty structure.[28] But in the case of Rahim Ademi and Mirko Norač the Supreme Court of Croatia concluded that war crimes appeared as part of a lawful military action by the Croatian Army that has been criticised by Amnesty International.[29]

In 2003, a special war crimes chamber in the Belgrade District Court was established.[30] The Human Rights Watch was concerned that the newly created war crimes chambers in Serbia required police cooperation in order to obtain evidence.[31] But issues emerged in Serbia regarding police investigations, because the police had committed war crimes during the war. Therefore, it was difficult to make any real progress in the criminal

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herself in person or through legal assistance of his or her own choosing.", Article 21 of the ICTY Statute: "to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing ....'; Article 63 of the Rome Staute provides that 'the accused shall be present during the trial, [unless] the accused, being present before the Court, continues to disrupt the trial, [in which case] the Trial Chamber may remove the accused… Such measures shall be taken only in exceptional circumstances.' *Colozza Case* (Colozza and Rubinat v. Italy, Series A, No. 89, 1985); *Zana Case* (Zana v. Turkey, Series A, No, 274, 1997); *Lala Case* (Lala v. Netherlands, Series A, No 29-A, 1994); *Poitrimol v. France*, (1993) 18 E.H.R.R. 130, para. 31; *Pelladoah v. The Netherlands* (1995) 19 E.H.R.R. 81, para. 23.

[24] OSCE, Supplementary Report, see note 20, p. 20; Bogdan Ivanisević, 'Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina and Serbia and Montenegro' Human Rights Watch 16 No 7 (D) (2004) 1, 11; *Lora Case* Zupanjski Sud Spilt Split County Court (Case No. K 30/02 20), November 2002.

[25] OSCE, Supplementary Report, see note 20, p. 8.

[26] Croatian Witness Protection Act (Zakon o Zaštiti Svjedoka), Official Gazette No. 163/2003, 16 October 2003.

[27] *Prosecutor v. Rahim Ademi and Mirko Norač* (Case No. Case No.: IT-04-78-PT), see note 18, para. 33; *Prosecutor v. Rahim Ademi and Mirko Norač* (Case No. Case No.: IT-04-78-PT), Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11 bis, 14 September 2005, para. 46.

[28] Ibid.

[29] OSCE, Supplementary Report, see note 20, p. 8; Supreme Court of the Republic Croatia, (Vrhovni Sud Republike Hrvastke), Case No. I Kž 1008/08-13, 11 March 2010; *Prosecutor v. Rahim Ademi and Mirko Norač* (Case No. Case No.: IT-04-78-PT), see note 18, paras. 4-9; Zagreb District Court (Presuda Zupanijski sud Zarebu), Case No. II K-rz-1/06, 30 May 2008; Amnesty International, 'Croatia, Briefing to the Human Rights Committee on Follow-up to the Concluding Observations on Croatia' (2011), p. 11.

[30] Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (Oxford University Press, Oxford 2012) p. 497; Bogdan Ivanisević, 'Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina and Serbia and Montenegro' Human Rights Watch 16 No 7 (D) (2004) 1, 15.

[31] Human Rights Watch Report, see note 21, p. 2.

investigations.[32] According to the Human Rights Watch report, government officials of Serbia openly opposed the work of the ICTY.[33] Hence, the report pointed out that transfers appeared unlikely as long as Serbia remains unwilling to cooperate with the ICTY. ICTY President Theodor Meron expressed that 'Belgrade has shown such a lack of cooperation that we cannot send accused Serbian war criminals back.'[34] However, on 17 April 2007 the case of Vladimir Kovačević was transferred to Serbia.[35] The Referral Bench was satisfied that an adequate legal framework existed that criminalised the alleged conduct of the accused, provided an appropriate punishment, and ensured compliance with the requirements of a fair trial.[36] In April 2006, the ICTY found the accused unfit to enter a plea or stand trial. The Belgrade District Court acknowledged this.[37] Because of the special situation regarding the health of the accused, the Referral Bench examined Serbian law and noted that the Serbian Criminal Procedure Act[38] provides regulations which ensure that an accused will not have to stand trial if he is found to be unfit.[39] According to the annual assessment and progress report of the Residual Mechanism, the Residual Mechanism continues to monitor for any change of status in the Vladimir Kovačević case.[40]

The cooperation of Serbia with the ICTY proved to be difficult. The third annual report of the ICTY pointed out that the indictees Radovan Karadžić and Ratko Mladić were not arrested for a long period and moreover remained in official positions. There was no effort by the Serbian authorities to apprehend the fugitives known to be hiding in their territory.[41] Although Serbia practically suspended any cooperation with the ICTY in the beginning of 2004, in 2005 the Serbian authorities publicly recognised the need for full cooperation with the ICTY. This was due to Serbia's desire to be integrated into the European Union. But from October 2006 to March 2007 the cooperation deteriorated seriously, and no progress was made regarding the indictees Karadžić and Mladić.[42] Finally, with the arrest of Ratko Mladić on 26 May 2011 and the arrest of Goran Hadžić on

[32] Ibid.
[33] Ibid.
[34] Ibid., p. 8.
[35] *Prosecutor v. Vladimir Kovačević* (Case No. IT-01-42/2-1), see note 18.
[36] Ibid., paras. 25-42; The applicable substantive law: Criminal Code of the Socialist Federal Republic of Yugoslavia (Krivični Zakon Savezne Republike Jugoslavije), Official Gazette SFRJ, No. 44, 1 July 1977 and Criminal Code of Serbia and Montenegro (Krivični Zakon Republike Srbije), Official Gazette of the Republic of Serbia, Nos. 8512005, 88/2005, 107/2005.
[37] *Prosecutor v. Vladimir Kovačević* (Case No. IT-01-42/2-1), Public Version of the Decision on Accused's Fitness to Enter a Plea and Stand Trial, 12 April 2006.
[38] Serbian Criminal Procedure Act (Zakonik o Krivičnom Postupku), Official Gazette of the Republic of Serbia, Nos. 70/2001, 68/2002. (2006).
[39] *Prosecutor v. Vladimir Kovačević* (Case No. IT-01-42/2-1), see note 18, para. 26.
[40] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016*, UN Doc. S/2016/453, 17 May 2016, para. 53.
[41] *Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/51/292- S/1996/665, 16 August 1996, para. 167.
[42] *Thirteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN Doc. A/61/271–S/2006/666, 21 August 2006, para. 79.

20 July 2011, Serbia met a key obligation to the ICTY.[43] However, according to the most recent annual report issued in 2016, Serbia has failed to cooperate with the ICTY and has not executed the arrest warrants of the ICTY for three Serbian indictees.[44]

In BIH, a special war crimes chamber was created as part of the State Court of BIH to try the most serious war crimes cases.[45] The chamber was staffed with international and local judges. But the number of international staff decreased over time.[46] In the case of Radovan Stanković, the question appeared as to whether the War Crimes Chamber is a 'national court' because it includes international judges.[47] The Referral Bench argued that Article 9 (1) of the ICTY Statute does not require justification for giving any meaning to 'national court' other than the usual connotation that it constitutes a court of or pertaining to a nation.[48] The War Crimes Chamber is a part of the State Court of BIH and was created according to the statutory law of BIH. According to the Referral Bench, including judges who are not nationals of BIH does not make the State Court any less a 'national court'.[49]

Since the establishment of the Special War Crimes Chamber of the State Court of BIH in March 2005 significant results were achieved.[50] In particular, BIH demonstrated more ethnic diversity in prosecutions than elsewhere in former Yugoslavia.[51] But many persons whose prosecutions were approved by the ICTY remained at liberty in those parts of BIH in which the ethnic group to which they belonged was the majority. Political elites helped many suspects approved by the ICTY for prosecution to remain at large.[52] According to the third annual report of the ICTY, BIH has been by far the most cooperative party, because it replying to nearly every warrant addressed to it.[53] But the

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[43] *Eighteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/66/210–S/2011/473, 31 July 2011, para. 61; *Seventeenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/65/205–S/2010/413, 30 July 2010, para. 66.

[44] *Twenty-third annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc.* A/71/263-S/2016/670, 1 August 2016, para. 26.

[45] UN Security Council 'Security Council briefed on establishment of War Crimes Chamber within State Court of Bosnia and Herzegovina' United Nations Press Release, SC/7888, 8 October 2003.

[46] Ibid., p. 11.

[47] *Prosecutor v. Radovan Stanković* (Case No. IT-96-23/2-PT), see note 18, paras. 23-31.

[48] Ibid, para. 26.

[49] Ibid, para. 23.

[50] *Thirteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/61/271–S/2006/666, 21 August 2006, para. 83.

[51] In 2004, members of the local ethnic majority were tried or indicted in several important cases, including the Konjić case, Baković case, and the so-called Dretelj case.

[52] Bogdan Ivanisević, 'Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina and Serbia and Montenegro' Human Rights Watch 16 No 7 (D) (2004) 1, 13.

[53] *Third Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/51/292- S/1996/665, 16 August 1996, para. 167; *Tenth annual report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN Doc. A/58/297–S/2003/829, 20 August 2003, para. 246; *Eleventh annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/59/215-S/2004/627, 16 August 2004, para. 280; *Fifteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/63/210–S/2008/515, 4 August 2008, para. 80; *Sixteenth annual report of the International Tribunal for the Prosecution of*

ICTY's Prosecutor expressed concern in the annual report of 2010 after political figures in BIH made statements supporting individuals convicted of violations of international humanitarian law, and denying any existence of committed crimes. The Office of the Prosecutor expressed that such statements are damaging and affect directly the cooperation with the ICTY.[54]

When transferring the case of Radovan Stanković, the Referral Bench concluded that there was an appropriate legal framework to address the criminal acts of the accused and that there was an adequate penalty structure.[55] Further, Chapter II of the BIH Law on Protection of Vulnerable Witnesses and Witnesses under Threat provides measures for the anonymity of witnesses in order to protect them.[56] But according to the monitoring report in the case of Gojko Janković, the Law of Protection of Witnesses was not always applied uniformly. This resulted in the provisions missing clarity or not regulating all matters.[57]

Issues arose regarding fair trial standards. The trials appeared to have problems with witness testimony. In case where a witness shared the same ethnicity as the accused, the witness was often afraid or otherwise unwilling to testify in war crimes trials.[58] In addition, problems appeared regarding communication with the defence counsel lawyer.[59] Further, according to the report of the Commission for Human Rights of the Parliament of BIH, violence occurred against Serb and Croat prisoners in the Zenica Correctional

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Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. A/64/205–S/2009/394, 31 July 2009, para. 66; *Nineteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/67/214–S/2012/592, 1 August 2012, para. 78; *Twentieth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/68/255–S/2013/463, 2 August 2013, para. 57; *Twenty-first annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN Doc. A/69/225–S/2014/556, 1 August 2014, para. 47: *Twenty-second annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/70/226–S/2015/585, 31 July 2015, para. 47; *Twenty-third annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, UN Doc. A/71/263–S/2016/670, 1 August 2016 para. 44; *Twelfth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/60/267–S/2005/532, 17 August 2005, para. 192; *Fourteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/62/172–S/2007/469, 1 August 2007, para. 85.

[54] *Seventeenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/65/205–S/2010/413, 30 July 2010, para. 74.

[55] Criminal Code of Bosnia and Herzegovina (Krivični Zakon Bosne I Hercegovine), Official Gazette of Bosnia and Herzegovina, No. 37/03, 54/04, 61/04; *Prosecutor v. Radovan Stanković* (Case No. IT-96-23/2-PT), see note 18, para. 46; *Prosecutor v. Gojko Janković* (Case No. IT-96-23/2-AR11bis.2), Decision on Rule11 bis Referral, 15 November 2005, para. 43.

[56] BIH Law on Protection of Vulnerable Witnesses and Witnesses under Threat (Takon o Zaštiti Svjedoka pod Prjetnom Ugroženih Svjedoka), Official Gazette of Bosnia and Herzegovina, No. 21/03, 61/04, Art. 6 *et seq*.; *Prosecutor v. Mitar Rašević and Savo Todović* (Case No. It-97-25/1-PT), see note 18, 90- 91; *Prosecutor v. Radovan Stanković* (Case No. IT-96-23/2-PT), see note 18, para. 82.

[57] *Prosecutor v. Gojko Janković* (Case No. IT-96-23/2-AR11bis.2), Prosecutor's Third Progress Report, 1 August 2006, Annex A, OSCE Mission BIH, Second Report Case of Defendant Gojko Janoviić , July 2006, p. 3. See also: *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević* (Case No. Case No. IT-02-65-PT), Prosecutor's Eight Progress Report, 3 April 2008, Annex A, OSCE Mission BiH, Seventh Report in the Željko Mejakić et al. Case, March 2008, pp. 1-2.

[58] Bogdan Ivanisević, 'Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina and Serbia and Montenegro' Human Rights Watch 16 No 7 (D) (2004) 1, 21.

[59] *Prosecutor v. Paško Ljubičić* (Case No. IT-00-41-PT), Prosecutor's Third Progress Report, 19 March 2007, para. 8; *Prosecutor v. Mitar Rašević, Savo Todović* (Case No It-97-25/1-PT), Prosecutor's Fourth Progress Report, 17 July 2007, Annex A, OSCE Mission BIH Third Report in the Mitar Rašević and, Savo Todović Case, July 2007, p. 3; *Prosecutor v. Mitar Rašević, Savo Todović* (Case No It-97-25/1-PT), Decision on Referral of Case Under Rule 11 Bis, 8 July 2005, para. 61.

Facility.[60] But the Referral Bench took into consideration that the authorities of BIH took the necessary steps to solve these problems.[61] The Law of BIH on Execution of Criminal Sanctions, Detention, and other Measures ensures that the operation of the detention facility is in accordance with international standards.[62] In addition, an agreement was reached between the ICTY Prosecutor and the chairman of the OSCE Mission BIH. The OSCE Mission BIH monitors the transferred proceedings, so the case may be revoked if the national authorities do not provide detention facilities in accordance with international standards.[63] Concerns exist regarding national or ethnic bias in the judicial system of BIH.[64] According to Article 4 of the BIH Law on the State Court,[65] the Parliamentary Assembly of BIH elects the judges of the State Court upon recommendation by the Commission for the Nomination of Judges to the Court. However, the Parliamentary Assembly is composed of two chambers: the House of Peoples and the House of Representatives, after Articles IV.1 and IV.2 of the Constitution of Bosnia and Herzegovina (BIH Constitution).[66] One-third of the Delegates of the House of Peoples and one-third of the members of the House of Representatives must be from the area Republika Srpska. According to Article VI.1 (a) of the BIH Constitution, the Constitutional Court consists of nine members, four of whom are selected by the House of Representatives of the Federation, two by the Assembly of Republika Srpska, and the remaining three by the President of the European Court of Human Rights after consultation with the Presidency of BIH. According to Article V of the BIH Constitution, the Presidency is composed of three members, and one is being a Serb directly elected from the area of Republika Srpska. Therefore, the inclusion of Republika Srpska in the judge nomination provides a guard against biased judgements based upon nationality or ethnicity.[67]

[60] *Prosecutor v. Paško Ljubičić* (Case No: IT-00-41-PT), see note 18, para. 45; *Prosecutor v. Mitar Rašević and Savo Todović* (Case No. It-97-25/1-PT), see note 18, para. 63.
[61] Ibid., paras. 47- 48.
[62] Law of BIH on Execution of Criminal Sanctions, Detention, and other Measures (Zakona Bosne i Hercegovine o Izvršenju Krivičnih Sankcija, Pritvora i Drugih Mjera), Official Gazette of Bosnia and Herzegovina, No. 13/05.
[63] *Prosecutor v. Radovan Stanković* (Case No. IT-96-23/2-PT), Prosecutor's Second Progress Report, 20 February 2006, para. 4.
[64] *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević* (Case No. Case No. IT-02-65-PT), see note 18, paras. 83.
[65] Official Gazette of Bosnia and Herzegovina, No. 37/03, 54/04, 61/04.
[66] Official Gazette of Bosnia and Herzegovina, No. 36/03, 26/04, 63/04, 13/05.
[67] *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević* (Case No. Case No. IT-02-65-PT), see note 18, paras. 83-87; Olympia Bekou 'Rule 11 bis: An Examination of the Process of Referrals to National Courts in ICTY Jurisprudence' Fordham International Law Journal (2010), p. 767. In May 2006 the accused were transferred to the authorities of BIH. Between the Prosecutor of BIH and Dušan Fuštar an acceptance of a plea agreement was reached, so the Court of BiH separated his case and pronounced a first-instance judgement finding Fuštar guilty of crimes against humanity and sentencing him to 9 years' imprisonment. (Sud Bosne i Herzegovine, Case No.: X-KR/06/200, 14 April 2008) In May 2008 the Court of BIH pronounced a first-instance judgement, finding Željko Mejakić, Momčilo Gruban and Duško Knežević guilty of crimes against humanity. Mejakić was sentenced to 21 years' imprisonment, Gruban to 11 years' imprisonment and Knežević to 31 years' imprisonment. (Sud Bosne i Herzegovine, Case No.: X-KR/06/200, 30 May 2008) However, in February 2009, the Court of BiH Appellate Panel confirmed the Mejakić and Knežević's sentences, but reduced Gruban's sentence to 7 years' imprisonment. (Sud Bosne i Herzegovine, Case No.: X-KRž/06/200, 19 February 2009).

The reports of the OSCE Mission BIH show problems concerning custody judgements.[68] The first report of the OSCE Mission BIH regarding the case of Radovan Stanković notes that the defendants right to have a judge, which reviews his detention pursuant to Article 5 (3) of the European Convention on Human Rights (ECHR), has been breached, because the Preliminary Hearing Judge considered himself bound by the primacy of the ICTY's order for Detention on Remand.[69] The decision on custody was not sufficiently justified. In addition, the Appellate Panel did not provide the judicial review required by Article 5 (4) of the ECHR, because it did not substantially re-examine the findings of the Preliminary Hearing Judge, but instead practically rubber-stamped the first instance decisions.[70] Another issue appeared in the case of Radovan Stanković when the rehearing on the motion on custody was held prematurely because the hearing was held before the decision on the BIH Prosecutor's indictment was reached.[71] Scheduling the hearings prematurely could give the impression that the judge perceived the indictment as adapted and confirmed prior to having reviewed the adapted charges and the evidence supporting the new counts.[72] The Court did not provide the Defence with the BIH Prosecutor's indictment or equivalent information, while it expected the Defence to position themselves on the issue of pre-trial custody at the hearings in question. This hearing was intended to provide the Defence with an opportunity to challenge the lawfulness of pre-trial custody. But the Defence was called to present argumentation regarding a hypothetical situation. The European Court of Human Rights has found that the detained person must be told the reason for his or her detention.[73] Article 132 (1) of the Criminal Procedure Code of Bosnia and Herzegovina (BIH CPC) considers the existence of a grounded suspicion as the essential pre-condition for ordering custody. The European Court of Human Rights also requires such a suspicion.[74] Further, the procedural right of

[68] *Prosecutor v. Mitar Rašević, Savo Todović* (Case No It-97-25/1-PT), Prosecutor's Tenth Progress Report, 19 Janury 2009, Annex A, OSCE Mission BIH Ninth Report in the Mitar Rašević and, Savo Todović Case, Janury 2009, p. 2.
[69] *Prosecutor v. Radovan Stanković* (Case No. IT-96-23/2-PT), Prosecutor's Second Progress Report, Case No. IT-96-23/2-PT, 20 Ferbuary 2006, Annex A, First Report Case of Defendant Radovan Stanković, February 2006, p. 18; *Prosecutor v. Gojko Janković* (Case No. IT-96-23/2-AR11bis.2), Prosecutor's Second Progress Report, 3 May 2006, Annex A, OSCE Mission BIH, First Report Case of Defendant Gojko Janoviić, Aril 2006, p. 11; *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević* (Case No. Case No. IT-02-65-PT), Prosecutor's Second Progress Report, 3 October 2006, Annex, OSCE Mission BIH, First Report in the Željko Mejakić et al. Case, September 2006, pp. 7-8; *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević* (Case No. Case No. IT-02-65-PT), Prosecutor's Fifth Progress Report, 3 July 2007, Annex A, OSCE Mission BIH, Fourth Report in the Željko Mejakić et al. Case, June 2007, pp. 2-4; *Prosecutor v. Paško Ljubičić* (Case No IT-00-41-PT), Prosecutor's Second Progress Report, 18 December 2006, Annex A, OSCE Mission BIH First Report in the Paško Ljubičić Case, December 2006, pp. 7-9; *Prosecutor v. Paško Ljubičić* (Case No IT-00-41-PT), Prosecutor's Third Progress Report, 19 March 2007, Annex A, OSCE Mission BIH Second Report in the Paško Ljubičić Case, March 2007, pp. 3-6; *Prosecutor v. Milorad Trbić* (Case No. IT-05-88/1-PT), Prosecutor's Third Progress Report, 23 January 2008, Annex, OSCE Mission BiH Case 'Milorad Trbić Second Report in the OSCE Mission BIH', Janurary 2008, p. 2; *Prosecutor v. Mitar Rašević, Savo Todović* (Case No. It-97-25/1-PT), Prosecutor's Second Progress Report, 17 January 2007, Annex A, OSCE Mission BIH First Report in the Mitar Rašević and, Savo Todović Case, January 2007, p. 5; *Prosecutor v. Mitar Rašević, Savo Todović* (Case No It-97-25/1-PT), Prosecutor's Fourth Progress Report, July 2007, Annex A, OSCE Mission BIH Third Report in the Mitar Rašević and, Savo Todović Case, July 2007, p. 1.
[70] Ibid.
[71] Ibid., pp. 20-24.
[72] Ibid., p. 21.
[73] *X v. United Kingdom*, European Court of Human Rights, 5 November 1981, para. 66.
[74] *Tomasi v. France*, (Series A, No 241-A, Application No 12850/87) 15 EHRR 1, 27 August 1992, para. 84.

equality of arms had been breached because the Prosecutor had knowledge of the accused and the evidence proposed whereas the Defence did not. The justification given by the Preliminary Hearing Judge as to the lack of available courtroom space is not convincing, especially when one balances it against the infringement of the defendant's rights.[75] The Appellate Panel argued that holding a hearing on custody before the indictment is confirmed is the correct procedure in general according to the BIH CPC. It would be pointless and purposeless to call the accused to give his opinion on the grounded suspicion for detention after the indictment is confirmed.[76] However, it is logical that the motion on custody may be argued upon and evaluated only after an indictment was confirmed.

Problems appeared regarding the transparency of proceedings. In the case of Radovan Stanković, the Trial Panel decided upon the motion of the Prosecutor to exclude the public from the main trial.[77] The right to a public trial is a fundamental guarantee of criminal procedure incorporated in domestic law and international human rights standards.[78] However, Article 235 of the BIH CPC provides an exception and foresees the exclusion of the public when it is necessary to protect the personal and intimate life of the accused or to protect the interest of a minor or a witness. Article 6 (1) of the ECHR provides the same and implies a complex balancing act between the rights of the accused to a public trial and the interests of victims and witnesses involved in the proceedings. The court's written decision to exclude the public does not examine the necessity of ordering this measure on a case-by-case basis, while it also considers an argument to which the panel did not give the defendants an effective opportunity to reply.[79] In the case of Gojko Janković, the Court refused to allow journalists access to information concerning the audio record of a hearing that was held completely in an open session and that was prima facie public.[80] However, the right of the applicant to appeal and information on to whom such an appeal might have to be addressed was not provided. But the Freedom of Information Act (FIA) requires that the public needs to have access to information in order to control the public authorities, including the judicial authorities. In addition, Article 14 (3) (a) of the FIA requires the explanation of the legal basis for a decision when refusing case access, including public interest factors and all material issues. But the Presiding Judge of the case

[75] *Prosecutor v. Radovan Stanković* (Case No. IT-96-23/2-PT), Prosecutor's Second Progress Report, 20 Ferbuary 2006, Annex A, First Report Case of Defendant Radovan Stanković, February 2006, pp 21-24.
[76] Ibid.
[77] *Prosecutor v. Radovan Stanković* (Case No. IT-96-23/2-PT), Prosecutor's Second Progress Report, 20 Ferbuary 2006, Annex A, First Report Case of Defendant Radovan Stanković, February 2006, p. 9.
[78] Article 234 (1) of the BIH CPC; Article 6 (1) of the ECHR, Article 14 (1) of the International Covenant on Civil and Political Rights (ICCPR).
[79] *Prosecutor v. Radovan Stanković* (Case No. IT-96-23/2-PT), Prosecutor's Second Progress Report, 20 Ferbuary 2006, Annex A, First Report Case of Defendant Radovan Stanković, February 2006, p. 9.
[80] *Prosecutor v. Gojko Janković* (Case No. IT-96-23/2-AR11bis.2), Prosecutor's Sixth Progress Report, 14 May 2007, Annex A, OSCE Mission BiH, Fifth Report Case of Defendant Gojko Janoviić , May 2007, pp. 4-8.

failed to provide that explanation, instead using only stereotypical phrases and copies of legal provisions without sustaining them with relevant facts.[81]

A major issue was the escape of Radovan Stanković, who was indicted by the ICTY for crimes against humanity and war crimes, and who remained at large after the ICTY transferred Stanković to BIH.[82] He escaped on 25 May 2007 while being taken to a dentist at a hospital in the Centre of Foča. That visit was arranged because of a medical certificate, which was later found to be falsified.[83] When Stanković reached the yard of the hospital and exited the prison car he headed to another car driven by an accomplice and drove away. The prison guards were unable to stop him.[84] The Minister of Justice explained at a press conference that mistakes were made, and disciplinary and criminal proceedings in relation to the escape of Radovan Stanković were conducted.[85] The nine guards escorting Stanković were suspended from duty and five were placed under criminal investigation. Further, the Assistant Chief Warden of Security of the Foča Penal Correctional was suspended from duty, criminally charged, and detained, while the Director of Foča Penal Correctional was dismissed from duty.[86] There were delays after the escape in issuing an international arrest warrant against the fugitive. The decision to send Stanković to Foča Penal Correctional was criticized, because he has close acquaintances in that area from when he lived in Foča.[87] But BIH authorities had not red-flagged that prison. After Stanković was on the run for nearly five years, he was arrested in Foča in January 2012 and returned to the same prison. Stanković is serving his sentence in the Foča Penal Correctional.[88]

b. Transferred Cases of the ICTR

The transfer of cases to Rwanda remained difficult for a long period.[89] It took time for Rwanda's legal framework to provide an adequate basis upon which to seek referral. Problems existed regarding the capacity of the Rwandan judicial system to deal with such cases, because it was already coping with thousands of local cases related to the

[81] Ibid.
[82] *Seventeenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/65/205–S/2010/413, 30 July 2010, para 75.
[83] *Prosecutor v. Radovan Stanković* (Case No. IT-96-23/2-PT), Prosecutor's Seventh Progress Report, 27 June 2007, Annex A, Sixth Report Case of Defendant Radovan Stanković, June 2007, p. 9.
[84] Ibid.
[85] Ibid.
[86] Ibid., p. 10.
[87] Ibid., p. 12.
[88] ICTY Prosecutor Press Release, FS/OTP/1473e, 21 January 2012, http://www.icty.org/en/press/statement-office-prosecutor-international-criminal-tribunal-former-yugoslavia-arrest-radovan (last visited on 11 April 2017); OSCE Mission to Bosnia and Herzegovina'OSCE Head of Mission welcomes the arrest of Radovan Stanković, Press Release, 23 January 2012, http://www.osce.org/bih/87144 (last visited on 11 April 2017); *Eighteenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991,* UN Doc. A/66/210–S/2011/473, 31 July 2011, para. 75.
[89] *Report on the completion of the mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015,* UN Doc. S/2015/884, 17 November 2015, para. 68.

genocide.[90] However, Rwanda enacted a series of important legal reforms by 2007, including the abolition of the death penalty and other important procedural protections in order to ensure fair trials. In 2010, the Prosecutor successfully launched referral applications.[91] The transfer of the cases to other countries also remained challenging. The Prosecutor attempted agreements with African states to accept referrals of cases from the ICTR and failed. Many suspects were in countries where judicial systems were under strain due to their own judicial workloads, or had investigated the cases but not pursued them and did not want to re-open these cases.[92] Another challenge was the non-retroactivity or nulla crimen sine lege principle.[93] Further, the domestic courts required a certain nexus to the crime, for instance that the accused either be present or have previously lived in that country before proceedings against them could be initiated. In 2007 the Prosecutor succeeded in referring two cases to France, where the two ICTR fugitives Laurent Bucyibaruta[94] and Wenceslas Munyeshyaka[95] were apprehended.

During the conflict in Rwanda, the Genocide Convention of 1948 as well as the Geneva Conventions of 1949 and their two Additional Protocols of 1977 were binding. Rwanda ratified the Convention of 1968 on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity. Treaties that Rwanda has ratified are more binding than organic and ordinary laws, according to Article 190 of the Rwandan Constitution of 2003.[96] In addition, Rwanda attempted to solve the fair trial issues by adapting the Organic Law No. 11/2007 of March 2007 (Transfer Law) concerning the transfer of cases to Rwanda from the ICTR.[97] The Transfer law deals with the prosecution of persons transferred from the ICTR. Therefore, the Referral Bench was satisfied that s sufficient legal framework existed.[98] According to the monitoring reports, the witness

[90] *Completion strategy of the International Criminal Tribunal for Rwanda,* UN Doc. S/2005/336, 24 May 2005, para. 39.
[91] Ibid.; *Completion strategy of the International Criminal Tribunal for Rwanda,* UN Doc. S/2007/323, 31 May 2007, para. 38; *Completion strategy of the International Criminal Tribunal for Rwanda*, UN Doc. S/2006/951, 8 December 2006, para.36.
[92] *Report on the completion strategy of the International Criminal Tribunal for Rwanda,* UN Doc. S/2008/322, 13 May 2008, para. 48.
[93] *Report on the completion of the mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015,* UN Doc. S/2015/884, 17 November 2015, para. 65; *The Prosecutor v. Michel Bagaragaza* (Case No. ICTR-05-86-AR11bis), Decision on Rule 11 bis Appeal, 30 August 2006, paras. 15-16; William Schabas, 'Anti-Complementarity: Referral to National Jurisdictions by the UN International Criminal Tribunal for Rwanda' Max Planck Y.B. U.N. L. 13 (2009) 29, 37; Alex Obote-Odora, 'Transfer of cases from the International Criminal Tribunal for Rwanda to Domestic Jurisdiction' Afr. J. Legal Stud. (2012) 147, 156; Lisa Yarwood and Beat Dold, 'Towards the End and Beyond: The "Almost" Referral of Bagaragaza in Light of the Completion Strategy of the International Criminal Tribunal for Rwanda' 6 Chinese J. Int'l L. 6 (2007) 95, 114; *Prosecutor v. Michel Bagaragaza* (Case No. ICTR-2005-86-R11bis), Decision on the Prosecutor's Extremely Urgent Motion for Revocation of the Referral to the Kingdom of the Netherlands Purtsuant to Rule 11 bis (F) & (G), 17 August 2007; *Hoge Raad der Nederlanden* (Case No. 08/00142. Ho. 21), October 2008.
[94] *Prosecutor v. Laurent Bucyibaruta* (Case No. ICTR-2005-85-I), Decision on Prosecutor's Request for Referral of Laurant Bucyibaruta's Indictment to France, 20 November 2007.
[95] *Prosecutor v. Wencelas Munyeshyaka,* (Case No. ICTR-2005-87-I), Decision on the Prosecutor's Request for Referral of the Wenceslas Munyeshyaka's Indictment to France, 20 November 2007.
[96] Constitution of the Republic of Rwanda and its Amendments of 2 December 2003 and of 8 December 2005, 4 June 2003.
[97] Law Concerning Transfer of Cases to the Republic of Rwanda from the International Criminal Tribunal of Rwanda and from Other States, Organic Law No 11/2007, 16 March 2007.
[98] Ibid., para. 92; Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 181; *Prosecutor v. Bernard Munyagishari* (Case No. ICTR-2005-89-R11bis), Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 6 June 2012, para. 89.

programmes Victim and Witness Support Unit and the Witness Protection Unit are fully operational and functioning.[99]

The death penalty has been abolished pursuant to the Abolition of the Death Penalty Law.[100] But the death penalty was replaced with life imprisonment 'with special provisions', which would include detention in isolation. This led to concerns.[101] But the monitoring reports show that the accused transferred to Rwanda did not face life imprisonment in isolation.

Because of external influences and corruption, the question of whether Rwanda would be able to guarantee the independence and impartiality of their criminal justice system emerged.[102] In a report from 2013, Amnesty International expressed concerns regarding the Rwandan judiciary's capacity in dealing with high-profile political cases.[103] The Amnesty International report pointed out official statements made by the Rwandan authorities before the trial of Victoria Ingabire and gave evidence that the judge favoured the prosecution.[104] But in the case of Jean Uwinkindi, the Trial Chamber argued that the Rwandan judges benefit from the same presumption of impartiality that applies to the judges of the ICTR. Article 140 of the Rwandan Constitution mandates that the judiciary is independent and separate from the legislative and executive arms of government.[105] In addition, according to the Law on the Statutes for Judges and other Judicial Personnel, judges are completely independent in exercising their duties and are independent of the legislative and executive powers.[106] The monitoring reports show that the judges acted

[99] ICTR Monitoring Report for the Uwinkindi Case (Case No. MICT-12-25), July to August 2013, para 6.
[100] Organic Law No. 31/2007 of 25/07/2007 relating to the Abolition of the Death Penalty, Official Gazette of the Republic of Rwanda, Year 46, no. special of 25 July 2007; Jamil Ddamulira Mujuzi, 'Issues Surrounding Life Imprisonment after the Abolition of the Death Penalty' Human Rights Law Review 9 (2009), 329.
[101] *Prosecutor v. Yussuf Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 28 May 2008, para 39; Jesse Melman, 'The Possibility of Transfer (?): A Comprehensive Appraoch tio the International Criminal Tribunal for Rwanda's Rule 11bis to Permit Transfer to Rwandan Domestic Courts' Fordham Law Review 79 (2010) 1271, 1297; *Prosecutor v. Gaspard Kanyarukiga* (Case No. ICTR-2002-78- R11bis), Decision on Request for Referral, 6 June 2008, paras. 8, 22; Alex Obote-Odora, 'Transfer of cases from the International Criminal Tribunal for Rwanda to Domestic Jurisdiction' Afr. J. Legal Stud. (2012) 147, 160.
[102] *Prosecutor v. Jean Uwinkindi* (Case No. ICTR-2001-75R11bis), Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011, para. 22; *Prosecutor v. Fulgence Kayishema* (Case No. ICTR-01-67-R11bis), Decision on Prosecutor's Request for Referral to The Republic of Rwanda, 22 February 2012, paras. 17-19; *Prosecutor v. Phénéas Munyarugarama* (Case No. ICTR-02-79-R11bis), Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 28 June 2012, paras. 16-21; *Prosecutor v. Aloys Ndimbati* (Case No. ICTR-95-1F-R11bis), Decision on the Prosecutor's Request for Referral of the Case of Aloys Ndimbati to the Republic of Rwanda, 25 June 2012, paras. 15- 18; ICTR Monitoring Report for the Uwinkindi Case (Case No. ICTR-2001-75-R11bis), (A. Ahmed, July-August 2013), 12 September 2013, para 23.
[103] Amnesty International, 'Justice in Jeopardy: the first instance trial of Victoire Ingabire' Amnesty International (2013) http://www.amnesty.org/en/library/info/AFR47/001/2013/en (last visited on accessed 11 April 2017; *Prosecutor v. Bernard Munyagishari* (Case No. ICTR-2005-89-R11bis), see note 98.
[104] *Prosecutor v. Fulgence Kayishema* (Case No. ICTR-01-67-R11bis), see note 102, paras. 121-142; *Prosecutor v. Charles Sikubwabo* (Case No. ICTR-95-ID-R11bis), Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 26 March 2012, paras. 119-140; *Prosecutor v. Ladislas Ntaganzwa* (Case No. ICTR-96-9-R11bis), Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 8 May 2012, paras. 59-74; *Prosecutor v. Bernard Munyagishari* (Case No. ICTR-2005-89-R11bis), see note 98, paras. 172-199; *Prosecutor v. Ryandikayo (*Case No. ICTR-95-1E-R11bis), Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 20 June 2012, paras. 57-66; *Prosecutor v. Aloys Ndimbati* (Case No. ICTR-95-1F-R11bis), see note 102, para. 51-57; *Prosecutor v. Phénéas Munyarugarama* (Case No. ICTR-02-79-R11bis), see note 102, paras. 43-52.
[105] *Prosecutor v. Jean Uwinkindi* (Case No. ICTR-2001-75-R11bis), see note 102, para. 185.
[106] Law on the Statutes for Judges and other Judicial Personnel, Organic Law Law No. 6bis/2004, 14 April 2004.

impartially throughout the hearings. No indications exist that the accused do not get a fair trial.

The Referral Chamber noted that the criminalisation of genocide ideology was a barrier for fair trials in Rwanda because of the fear of prosecution of potential witnesses.[107] For example, Victoria Ingabire was an opposition politician who returned from exile to contest the elections in Rwanda in 2010. The Supreme Court of Rwanda sentenced her to 15 years in prison.[108] The decision was based on the punishment of the crime of genocide ideology because of her speech, which referred to problems with reconciliation and ethnic violence.[109] But Rwanda reduced the applicable sentences for the crime of genocide ideology and eliminated criminal responsibility for minors in the draft Penal Code.[110] And Article 13 of the Transfer Law provides protection for witnesses who testify.[111] According to the monitoring reports, no witness was punished for the crime of genocide ideology in relation to the transferred cases.

The Human Rights Watch Submissions stated that the Rwandan legal system is still limited in its ability to provide financial support.[112] The monitoring reports pointed out that the counsel for Jean Uwinkindi had not been paid for his work. The budget did not provide for hiring investigators or to travel to identify potential Defence witnesses.[113] However, Rule 11bis of the ICTR RPE does not require a specific level of funding. Instead it only requires funding in accordance with the principle of equality of arms, which was provided, at least according to the Referral Chamber. Therefore, the Referral Chamber was satisfied that an adequately funded legal aid system existed to help the accused.[114]

According to the monitoring reports, Bernard Munyagishari complained that his request for an interpreter in Rwanda had been denied.[115] According to Article 5 of the Constitution of Rwanda, the national language of Rwanda is Kinyarwanda.[116] The Court decided to provisionally appoint a French-Kinyarwanda interpreter for the accused in order

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[107] *Prosecutor v. Gaspard Kanyarukiga* (Case No. ICTR-2002-78-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 30 October 2008, para. 26.

[108] 'Rwanda: L'Opposante Victoire Ingabire Condamnée à 15 Ans de Prison en Appel', in: Le Monde, 13 Decemer 2012, http://www.lemonde.fr/afrique/article/2013/12/13/rwanda-l-opposante-victoire-ingabire-condamnee-a-15-ans-de-prison-en-appel_4334077_3212.html (last visited 30. March 2017); Denise Bentrovato, 'Narrating and Teaching the Nation: The Politics of Education in Pre- and Post-Genocide Rwanda' (V&R unipress GmbH, Göttingen 15.02.2016), p. 104.

[109] Ibid.

[110] *Prosecutor v. Bernard Munyagishari* (Case No. ICTR-2005-89-R11bis), see note 98, para. 97.

[111] ICTR Monitoring Report for the Uwinkindi Case (Case No. MICT-12-25), (C. Hometow, March 2013), 12 April 2013, para. 17.

[112] ICTR Monitoring Report for the Munyagishari Case (Case No. MICT-12-20), (Z. Lasocik, October2014), 18 November 2014, para. 24; ICTR Monitoring Report for the Munyagishari Case (Case No. MICT-12-20), (Z. Lasocik, January 2015), 26 Febraury 2015, paras. 6-7; ICTR Monitoring Report for the Munyagishari Case (Case No. MICT-12-20), (I.Aboud, November 2015), 21 December 2015, para. 30.

[113] ICTR Monitoring Report for the Uwinkindi Case (Case No. MICT-12-25), (C. Hometow, March 2013), 12 April 2013, paras. 17, 23; ICTR Monitoring Report for the Uwinkindi Case (Case No. MICT-12-25), (A. Ahmed, September 2013), 12, 28 October 2013, para. 26; ICTR Monitoring Report for the Uwinkindi Case (Case No. MICT-12-25), (C. Hometow, May to June 2013), 30 June 2013, para. 8.

[114] *Prosecutor v. Charles Sikubwabo* (Case No. ICTR-95-ID-R11bis), see note 104, para. 100.

[115] ICTR Monitoring Report for the Munyagishari Case (Case No. MICT-12-20), (A. Ahmed, July-August 2013), September 2013, paras. 53-64, 84; Primairy Court Decision, Case No. 0036/DP/13/Nyarugeng, 6 August 2013; ICTR Monitoring Report for the Munyagishari Case (Case No. MICT-12-20), (S. Algozin, June 2014), 6 July 2014, para. 27.

[116] Article 5 of the Constitution of the Republic of Rwanda: 'The national language is Kinyarwanda. The official languages are Kinyarwanda, French and English'.

to provide the accused the opportunity to answer the Prosecution's assertions that he was Rwandan and understood Kinyarwanda.[117]

Most recently, in the case of Jean Uwinkindi, fair trial concerns appeared regarding the inability of the accused to communicate confidentially with his Defence Counsel. But the Chamber concluded that these problems were considered by the Rwandan authorities and were not 'ripe for current consideration as a basis for revocation pursuant to Article 6 (6) of the Statute.'[118] Therefore, the request of the accused was denied. However, this shows that the Residual Mechanism is flexible and willing to revoke referrals if the accused's fair trial rights are at risk.

B. Concluding Remarks

In practice, the trial function only concerns some ICTR accused still at large.[119] In the case of Rwanda it is important to emphasise that state authorities were implicated in the genocide.[120] Although the majority of the Rwandan population is Hutu, since the overthrow of the previous regime the Tutsi population is controlling the government. According to the amicus curiae of the International Criminal Defence Attorneys' Association, 90% of prosecutors and 90% of the judges belong to the Tutsi population.[121] However, the Trial Chamber in the case of Ildephonse Hategekimana noted that this fact does not in itself proof that the Rwandan justice system is biased.[122]

A critical point was the fact that the Rwandan Prosecution did not always pursue atrocities perpetrated by the Rwandan Patriotic Front that took power in July 1994. Amnesty International argued that the justice system has to show its impartiality by prosecuting crimes committed by persons, regardless of which party the person belongs to.[123] Although the Appeals Chamber in the Munyakazi transfer decision eventually ruled

[117] High Court of Rwanda, 30 January 2014; ICTR Monitoring Report for the Munyagishari Case (Case No. MICT-12-20), (S. Algozin, January and February 2014), 7 March 2014, para. 71; ICTR Monitoring Report for the Munyagishari Case (Case No. MICT-12-20), (S. Algozin, March 2014), 27 March 2014, para. 6.

[118] *Prosecutor v. Jean Uwinkindi* (Case No. MICT-12-25-R14.3), Decision on Requests for Revocation of an Order Refer- ring a Case to the Republic of Rwanda, 26 April 2017, 4.

[119] Phénéas Munyarugarama, Aloys Ndimbati, Fulgence Kayishema, Ladislas Ntaganzwa, Charles Ryandikayo and Charles Sikubwabo. *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, Annex I, 17 May 2016, para. 45; *Progress report of the Prosecutor of the International Residual Mechanism for Criminal Tribunals, Serge Brammertz, for the period from 16 November 2015 to 15 May 2016,* UN Doc. UN Doc. S/2016/453, Annex II, 17 May 2016, para. 6.

[120] *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, UN Doc. A/53/429 - S/1998/857, 23 September 1998, para. 57.

[121] *Prosecutor v. Fulgence Kayishema (*Case No. ICTR-2001-67-I), Brief of Amicus Curiae, ICDAA, Concerning the Request for Referral of the Accused to Rwanda Pursuant to Rule 11bis of the Rules of Procedure and Evidence, 3 January 2007, para. 22.

[122] *Prosecutor v. Ildephonse Hategekimana (*Case No. ICTR-00-55B-R11bis), 8 May 2012, para. 40, *Prosecutor v. Gaspard Kanyarukiga* (Case No. ICTR-2002-78-R11bis), see note 107, para. 38.

[123] Amnesty International, Rwanda: Suspects must not be transferred to Rwandan courts for trial until it is demonstrated that trials will comply with international standards of justice, AI Index: AFR 47/013/2007, November 2007, p. 2; See also: Carla Del Ponte, Presentation to the All Party Parliamentary Group on the Great Lakes Region and Genocide Prevention in Westminster, London, 25 November 2002; Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 187.

that the Rwandan justice system is sufficiently independent from executive influence, the Appeals Chamber also noted that a concern exists regarding genocide cases.[124] The Chamber argued that there could be a lack of sufficient guarantees against outside pressure on the judiciary regarding genocide cases, because of the past actions of the government.[125] However, the monitoring reports of the transferred cases show that the Rwandan judicial system is able to provide fair trials for the accused. Therefore, it could have been an option to transfer the residual functions to Rwanda instead of creating the Residual Mechanism. But at the time when the Security Council decided to establish the Residual Mechanism, no monitoring reports were available that could show whether the Rwandan justice system was able to conduct fair trials. However, the successful completion of the Tribunals' work depends on trials conducted with the highest standards of international human rights and due process. Further, it is necessary that impunity be prevented.[126] It is questionable, therefore, whether the requirements would have been met in the cases of the high-level accused. Although the analyses of the monitoring reports do not demonstrate any violation of the accused's fair trial rights, it does not guarantee that the impartiality would have been extended to the high-level accused.

Even if Rwanda would were completely prepared to fairly try cases, Rwanda does not benefit from the same authority that the ICTR does when asking for international cooperation and obtaining the arrest of the fugitives. High-level fugitives in particular often benefit from the help and protection of state entities and the Tribunals can ask these states to operate according to international legal obligations. The Security Council acted under Chapter VII of the UN Charter when establishing the Tribunals, and it particularly requested all states to cooperate with the Tribunals. This constitutes an obligation under international law, which results in the duty to surrender the fugitives.[127] Rwanda does not benefit from such power. Therefore, the Residual Mechanism has an authority similar to the ICTR, which makes the request for cooperation from other states easier.

Although BIH can conduct war crimes cases in accordance with international standards, there are remaining matters of concern, including witness protection, custody questions, and transparency of proceedings. The incident with Stanković especially invites criticism. When deciding on the establishment of the Residual Mechanism the two remaining fugitives of the ICTY were Goran Hadžić and Ratko Mladić, who was one of

[124] *Prosecutor v. Yussuf Munyakazi* (Case No. ICTR-97-36-R11bis), Decision on the Prosecution's Appeal Against Decision on Referral Under Rule 11bis, 8 October 2008; Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 180.
[125] Ibid.
[126] Larry Johnson, 'Closing an International Criminal Tribunal while maintaining International Human Rights Standards and Excluding Impunity' AJIL 99 (2005), 158, 174.
[127] Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 183.

the most prominent war criminals of the war. Transferring the judicial responsibility of cases concerning such high-level accused to a national jurisdiction, where war criminals could escape from prison, would not have been plausible. In order to maintain the legacy of the ICTY, it was of crucial importance to guarantee a proper trial for the two high-level fugitives. Although the support for domestic prosecutions of members of the ethnic majority and also the willingness to cooperate with the ICTY increased in BIH, the risk remained that the high-level fugitives might still receive help from political elites. On the other hand, the violation of the accused's fair trial rights could have appeared. As explained above, problems appeared during the trials regarding custody questions and transparency of proceedings. Especially in the case of such high profile cases, the exclusion of the public from the main trial requires proper justification. With respect to victims a proper conviction needed to be guaranteed.

In light of the fact that Croatia has been part of the European Union since 1 July 2013 and Serbia wants to become a part of the European Union, it would have been reasonable to transfer the residual functions to one of these countries. But it would not have been efficient to transfer residual functions to two different countries because the residual functions are connected. Furthermore, a unity of jurisdiction needed to be ensured, which is a part of the accused's fair trial rights. This could not be guaranteed if different judicial systems were to release judgements regarding the war criminals. In addition, it is not possible to transfer the residual functions to only one of the countries of former Yugoslavia. Because of the longstanding conflict between the different ethnicities, which culminated during the terrible war, it is not possible to pick out one country that should have the power to make judgements on the war crimes, as this could result in new conflicts among the countries. Therefore, it was the preferable option to locate the residual functions outside the area of former Yugoslavia. Thusly, none of the countries will be disadvantaged. In order to demonstrate that the international legal system is functioning and achieving the desired deterrence effect, the preferable option was to create the Residual Mechanism and not to transfer the functions of the Tribunals to the national authorities.

In order to effectively perform the trial function, the Residual Mechanism relies on other residual functions, including protection of witnesses, trial of contempt cases, supervision of enforcement of sentences, and review of judgements.[128] The Secretary-General's report suggested that all residual functions needed to be carried out by the Residual Mechanism or any other suitable body. The report pointed out that domestic

[128]Secretary-General's *Report on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals*, UN Doc. S/2009/258, 21 May 2009; *Statement by the President of the Security Council,* UN Doc. S/PRST/2008/47,19 December 2008, para. 250.

courts were not the preferable solution regarding certain residual functions. Different approaches between the various domestic jurisdictions when carrying out the residual functions would be unavoidable and would put at risk the rights of the accused.[129]

Therefore, establishing the Residual Mechanism was an appropriate decision because only an institution on an international level has the power and the authority to urge states to cooperate. And the assistance of the international community is easier to achieve for an international body like the Residual Mechanism. Further, in the case of referral to domestic courts, the downside would be the lack of guarantee that proper prosecutions would take place and that the rights of the accused would be protected at an acceptable level. High fairness and due process standards are of crucial importance for a legal system, and these standards would be put at risk when transferring the cases of the remaining fugitives to domestic courts. In particular, referring cases of a high-level fugitives to countries affected by their atrocities could very well jeopardize the rights of the accused given the aftermath of the war left in the minds of the affected population. With regard to the longstanding conflict between the ethnicities of former Yugoslavia and the atrocities committed against the Tutsi population in Rwanda, it cannot be expected that people have already forgotten what happened or would be able to look past their emotional reactions to the crimes. Therefore, it is not certain whether the affected countries could provide fair trials in accordance with international standards.

2. Transferring other Judicial Residual Functions to National Jurisdictions

Since appellate proceedings are considered to be a part of any trial proceedings, it is not possible to separate those two functions. Such an approach would pose a threat to the consistency of the Tribunals' jurisprudence. Therefore, the same arguments against the transfer of the trials function to national courts apply to the appellate proceedings. There would be no guarantee that proper prosecution would take place and that the rights of the accused would be ensured at a level deemed acceptable by the UN. Fairness and due process standards would be at especially high risk when transferring the cases to domestic courts. Regarding the costs, the 'Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period', issued on 20 November 2015, estimated that a month of pre-appeal activity and a month of appeal activity at the Residual Mechanism would produce savings in judicial expenses of close to

[129] Ibid., para. 251.

one half as compared to the expenses incurred for the same judicial activity at the two Tribunals.[130] Hence, costs were reduced already.

Retrials require the same approach as trials. Hence, the retrial function cannot be transferred to national authorities. The arguments against the transfer of trials and retrials are similar. Transferring the retrial function to national courts could destroy the Tribunals' legacy. National courts would be able to set aside the judgements of the Tribunals, and convicted persons could attempt to obtain revocation of their convictions entered by Tribunals. Thus, this approach could lead to impunity.

The review of judgements is a residual function of crucial importance. Therefore, the unavailability of that function would violate the rights of the convicted individuals. Scholars have also expressed concerns, as removing or unfairly limiting the rights of a convicted individual regarding the review of their cases could lead to a violation of fundamental human rights. [131] But according to Acquaviva, that position does not identify what 'unfairly limit' means and is not helpful in answering the question of how to ensure the review of judgments. The review of judgements is one function that could reasonably be transferred to a domestic jurisdiction, but certain guarantees have to be ensured.[132] Further, the transfer is a feasible option because the states of former Yugoslavia and also the states in which convicted persons are now serving sentences imposed by the ICTY are subject to the supervision of the European Court of Human Rights. The European Court of Human Rights has an excellent system to ensure that human rights are protected. This leads to the conclusion that as long as the review of judgments takes place under circumstances similar to those envisaged by the Tribunals' standards, further judicial proceedings in these systems would most probably be compatible with the standards of the European Court of Human Rights.[133]

The Secretary-General pointed out that review by national jurisdictions could be impractical because the various jurisdictions would have different approaches.[134] The Secretary-General's report considered the complex challenges in terms of fairness towards all convicted persons. The Secretary-General further explained that it could be difficult for national jurisdictions to review a judgement based on the Tribunals' Statutes and Rules of Procedure and Evidence. [135] Furthermore, in order to ensure that review does not end in a completely new trial, the institution dealing with review should have access to the

[130] *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 16.
[131] Ibid.
[132] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 2, p. 21.
[133] Ibid.
[134] Secretary-General's Report, see note 128, para. 80.
[135] Ibid.

Tribunals' archives, which contain all information considered in all previous cases, including the relevant records and evidence. The right to review a final judgement is fundamental and needs to be guaranteed on an international level. Transferring the review of judgement to national authorities of the affected countries or third countries could lead to legal uncertainties. Although the states of former Yugoslavia are subject to the supervision of the European Court of Human Rights, the approach of the different jurisdictions could result in a lack of fairness towards all convicted persons. This could lead to situations where the various states convict the accused persons differently for the same crime because of the different judicial systems. In addition, national jurisdictions would not be required to review judgements based on the Tribunals' Statutes and Rules of Procedure and Evidence. The lack of knowledge of the Tribunals' jurisprudence could result in an unfair limitation of the convicted persons' rights. However, transferring these functions to national courts would not deprive the accused of the right to review the judgement. It could be argued that the accused could still exercise his right but at a national level. The major argument against this, however, is that national courts would be able to set aside the judgements of the Tribunals, thus destroying the Tribunals' legacy. Therefore, the Residual Mechanism is an unbiased international body that provides the review of judgment in accordance with the Tribunals' jurisdiction at an international level.

Regarding contempt cases, it was discussed in the legal literature whether it would be a better option to transfer those cases to national jurisdictions in general.[136] According to Acquaviva, it is questionable whether the Residual Mechanism is the best option to deal with contempt and false testimony cases once the core activities of the Tribunals are over.[137] After some time, the contempt cases will most likely decrease in number because less confidential information will remain sensitive and a lesser number of witnesses or victims will need protection. Further, the Appeals Chamber of the ICTR noted that a Chamber should 'consider carefully if [contempt] proceedings are the most effective and efficient way to ensure compliance with obligations flowing from the Statute or the Rules in the specific circumstances of the case'.[138] According to Acquaviva, after the Tribunals closed, criminal proceedings by an international body could increasingly lose their efficiency in protecting the integrity of international justice. Therefore, in some cases national jurisdictions could be a better option to achieve the same result.[139] However, the protection of individuals, essential state interests, and the credibility of international

[136] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 2, p. 21; Catherine Denis, 'Critical Overview of Residual Functions' of the Residual Mechanisms and its Date of Commencement (including Transitional Arrangements)' JICJ 9 (2011) 819, 827.
[137] Ibid.
[138] *Prosecutor v. Karemera et al.* (Case No. ICTR-98-44-AR.91), 22 January 2009, para. 21.
[139] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 2, p. 21.

criminal justice as a whole are very important.[140] In order to achieve that protection, persons, 'who wilfully divulge confidential information which creates a real threat or danger to protected persons or other important interests' need to be punished. [141] According to Acquaviva, although that particular residual function could be transferred to a domestic jurisdiction, the Residual Mechanism has the better access to the archives, which makes it easier to identify and pursue persons who are in contempt of court or give false testimony.[142] But according to Denis, concerns appear regarding the transfer of contempt cases or false testimony. First, it is questionable whether national jurisdictions have the competence to prosecute persons for contempt of the Residual Mechanism or for giving false testimony. [143] A legal base would be necessary for exercising such an extraterritorial jurisdiction. Usually, an extraterritorial jurisdiction requires a link with the concerned state. That link may be found in the nationality of the perpetrator[144] or the victim[145], or if the criminal activities may cause prejudice, the state itself.[146]Although extraterritorial jurisdiction is recognised in principle,[147]it requires that the crimes affect the whole international legal order.[148] According to Denis, it is difficult to argue that contempt of the Residual Mechanism, or giving false testimony before it, falls within the universal jurisdiction or protective principle, because those cases do not prejudice the interests of states and do not affect all of humanity. Only the nationality principle or passive principle may be relevant for those cases and therefore, mainly Rwanda and states of former Yugoslavia would have the competence to prosecute those cases of contempt or false testimony on those principles. However, it could be argued that there needs to be a distinction between contempt in the courtroom and offences committed outside the courtroom, which could be tried at the national level. National courts are able to prosecute such offences.

Second, it could be impractical for a national jurisdiction to determine a problem that is connected to international proceedings, as the national jurisdiction was not involved in these proceedings. Further, the national jurisdictions are completely unfamiliar with

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[140] Ibid.
[141] Ibid.
[142] Ibid.
[143] Catherine Denis, 'Critical Overview of Residual Functions' of the Residual Mechanisms and its Date of Commencement (including Transitional Arrangements)' JICJ 9 (2011) 819, 826.
[144] Nationality Principle.
[145] Passive Personality Principle.
[146] Protective Principle.
[147] Universal jurisdiction allows states or international organizations to claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting entity. The universal jurisdiction applies to a number of crimes, for example piracy (United States v. Smith, 18 US (5Wheat.) 153 at 161- 162 (1820)), slave trade, traffic in children and women, terrorism (European Convention on the Suppression of Terrorism, (1978) 1137 UNTS 99), apartheid (International Convention on the Suppression and Punishment of the Crime of Apartheid, (1976) 1015 UNTS 243, Art IV (b)); See Yoram Dinstein 'The Universality Principle and War Crimes' in Michael N. Schmitt and Leslie C. Green (eds.) *The Law of Armed Conflict: Into the next Millennium* (Newport, RI: Naval War College, 1998), pp. 17- 37.
[148] Catherine Denis, 'Critical Overview of Residual Functions' of the Residual Mechanisms and its Date of Commencement (including Transitional Arrangements)' JICJ 9 (2011) 819, 827.

international proceedings.[149] Such cases are affiliated with the corresponding trial proceedings. The national courts would need to familiarise themselves with the Tribunals' and the Residual Mechanism's Statutes, Rules of Procedure and Evidence and case law. This very high workload could lead to mistakes in jurisprudence. The Tribunals interpret the elements of the crimes in their own way. A consistency in the case law would be at risk if the different domestic courts would rule on cases of contempt and false testimony. The various national jurisdictions would most likely approach the issues differently. That would lead to different standards. Further, the proceedings would require access to the relevant information and records of the concerned case, which would also include confidential documents. Therefore, it is questionable whether it would be efficient for the Residual Mechanism to transfer the relevant documents to the national courts when instances of contempt and false testimony only touch a small part of the case. The whole case involves many pages, and it would be an enormous workload for the Residual Mechanism to transfer all the transcripts of testimony, documentary evidence and exhibits to the national courts. The cost implications of such a procedure should also be pointed out.

Persons who knowingly and wilfully interfere with the administration of justice or give false testimony need to be prosecuted, or else the integrity of the Tribunals and the Residual Mechanism would be put at risk. However, the Residual Mechanism has the jurisdiction to refer cases concerning offences against the administration of justice to national jurisdictions.[150] It can be expected that the national jurisdictions consider themselves able to determine issues connected to proceedings tried before international jurisdictions. Article 70 (4) of the Rome Statute of the International Criminal Court stipulates that contempt offences can be prosecuted by national jurisdictions instead of the Court. Hence, this approach is recognised in international criminal justice, and the Residual Mechanism could adopt that procedure and transfer proceedings concerning contempt cases to national jurisdictions. This would reduce the workload of the Residual Mechanism.

3. Transferring Victim and Witnesses Protection and Assistance to National Jurisdictions

According to the Secretary-General's report, it is not possible to transfer the protection of victims and witnesses to national authorities without risking their safety. Therefore, the Secretary-General's report suggests a centralised body that monitors the protection of

[149] Secretary-General's Report, see note 128, para. 79.
[150] Article 6 (1) of the IRMCT Statute.

witnesses after the function has been transferred to national authorities.[151] According to Acquaviva, an international monitoring body with the authority to access the Tribunals' confidential records and modify the protective measures, if needed, is the best option in order to guarantee the protection of the witnesses.[152] However, both options require a monitoring body that causes additional costs. Therefore, neither option is more efficient than transferring the function to the Residual Mechanism.

After the physical closure of the Tribunals, court orders regarding the protection of victims and witnesses must continue to have effect. Transferring this function to national authorities of the affected countries would be impossible because there are tensions left between the different ethnic groups, particularly in the view of the atrocities committed. But transferring the function to a third country would be challenging, because it could not be ensured that the national authorities would also apply protection standards at an international level. This would result in risk to the safety of the victims and witnesses. In the case that a witness needs relocation to another country for his or her safety, national authorities could find it more difficult to negotiate relocation than an international body.[153] A particularly difficult issue is the extreme situation where a witness claims that the national authorities are not sufficiently protecting him or her. Furthermore, the different national jurisdictions would most likely apply different standards of protection.

The Residual Mechanism appears to be the best solution to implement the protection of victims and witnesses, because it is an international body that is able to effectively carry out this function. The Tribunals protect a large number of individuals. That protection should not simply end because the Tribunals close their doors. Many of these individuals put their lives at risk by providing evidence to the Tribunals. A failure to provide uninterrupted protection would damage the credibility of the Tribunals and endanger the work of the ICC as well as any future Tribunals. Witnesses will be less likely to assist if they have heard that witnesses were put at risk following the closure of operations.

National authorities would not be able to provide assistance to the same extent as an international body. Because staff members of the Tribunals continue to work for the Residual Mechanism, the Tribunals have provided knowledge of and experience with the affected countries to the Residual Mechanism. Therefore, transferring the function of assistance to national jurisdictions to another international institution would be time and cost consuming. However, the disclosure of material regarding protected witnesses

[151] Secretary Generals Report, see note 128, para. 78.
[152] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 2, p. 20.
[153] Secretary Generals Report, see note 128, para. 78.

requires a decision of a Chamber to vary the protective measures. Hence, it appears necessary that some sort of administrative Residual Mechanism is needed to cope with requests for additional information from national authorities.

4. Transferring Supervision of Enforcement of Sentences to National Authorities

Although this function is essentially an on-going administrative function, it also has ad hoc judicial aspects, because the President takes several criteria into account when deciding whether to grant pardon, including the gravity of the crime, the treatment of similarly situated prisoners, the prisoner's demonstrated rehabilitation, and all cooperation of the prisoner with the Prosecutor.[154] The President of the Residual Mechanism applies the same criteria when deciding on a pardon or commutation as the Tribunals' Presidents.[155] These are standard criteria, and it would be possible to transfer this function to national authorities. National authorities already carry out this function. Article 26 of the IRMCT Statute provides that a person convicted by the Tribunals or the Residual Mechanism is eligible for a pardon or commutation of sentence if the applicable law of the state in which the person is imprisoned allows it. Hence, regarding this function the national authorities work with familiar provisions.

But it could be argued that if such function would be completely transferred to national jurisdictions, the different approaches would result in unequal treatment between the convicted persons. Applying the standard criteria have generally resulted in the sentence being commuted when the convicted person has served about two-thirds of his sentence. But in the case of Biljana Plavšić, who received an eleven-year sentence for pleading guilty to persecution and other crimes against humanity, the ICTY President granted her request. The reason was her minimal cooperation with the Tribunal and the fact that she publicly withdrew her acceptance of responsibility.[156] Hence, decisions regarding early release can be difficult. In the case that a commutation request is filed based on special personal circumstances, the measures would be more complex and may require evidentiary hearings. Furthermore, the procedure related to the transfer and the subsequent execution of sentences were not completely satisfactory. In the case of Radovan Stanković, this almost resulted in impunity.[157] The President of the ICTY, Fausto Pocar, sent a letter to the BIH Justice Minister expressing his deep concern that even after transferring the jurisdiction of the case to BIH, the ICTY Tribunal retains its responsibilities with respect

[154] Rule151 of the IRMCT RPE.
[155] Secretary-General's Report, see note 128, para. 5; Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 2, p. 37.
[156] *Prosecutor v. Biljana Plavšić* (Case No. IT-00-39&40/1-ES) 14 September 2009.
[157] Sud Bosne i Herzegovine (Court of Bosnia and Herzegovina), Case No. X-KR-05/70, Sarajevo, 14.11.2006.

to victims and witnesses. The ICTY has an interest in ensuring that the sentence of persons convicted is enforced by the state receiving the transfer.[158] In addition, it needs to be considered that the Tribunals' commands could diminish once the Tribunals wound down its activities, leading to less pressure on national authorities to feel bound to the Tribunals' orders and judgments. Therefore, an international body is needed with the authority to ensure that an imposed sentence is effectively enforced. This residual function will likely need to be exercised for many decades, because, for example, the ICTY sentenced Milomir Stakić to 40 years, and the ICTR sentenced Juvénal Kajelijeli to 45 years.[159]

But national authorities contribute to the enforcement of sentences already. A good solution could be to transfer the function to national authorities but to implement a monitoring system. That would reduce the workload of the Residual Mechanism. According to Rule 128 IRMCT RPE, the Security Council 'may designate a body to assist it and to proceed to supervise the sentences after the Mechanism legally ceases to exist'. Therefore, the regulatory framework of the Residual Mechanism would allow such an approach in general. However, the requirements and character of such a body are not defined in the IRMCT RPE. But in order to avoid unfairness, independent experts and an intervention system would be needed to prevent unjustified unequal treatment.

[158] ICTY Digest Nr. 15, 11 June 2007, available at: http://www.icty.org/x/file/About/Reports%20and%20Publications/ICTYDigest/icty_digest_15_en.pdf (last visited on 11 April 2017).
[159] *Prosecutor v. Milomir Stakić* (Case No. IT-97-24-A), Judgement, 22 March 2006, para. 142; *Prosecutor v. Juvénal Kajelijeli* (Case No. ICTR-98-44A-A), Judgement, 23 May 2005, para. 119.

V. The Different Options for the Residual Functions

Besides the possibility of transferring the residual functions to national authorities, other options exist to carry on the residual functions after the Tribunals' closure. However, it is questionable whether these options would be appropriate and realistic.

1. Transferring all Residual Functions to External International Bodies

Considering residual functions such as tracking the remaining fugitives, management of the archives, and protection of witnesses, a centralised residual mechanism with the capacity to coordinate and continue the residual functions is necessary. All residual functions are closely intertwined. In addition, the Residual Mechanism needs to have power to issue decisions, which are binding for states, other entities, and individuals when needed. It would be impossible to transfer all residual functions of the Tribunals to different external entities, because it would be very difficult to establish links and hierarchies of authority between different states and organisations. Furthermore, transferring all residual functions of the Tribunals to non-judicial entities and NGOs is impossible because residual functions related to judicial activities are juristically very complex so an experienced court is required to carry these out properly.

2. Transferring all Residual Functions to One External National Body

Transferring all residual functions of both Tribunals to one state or those of each Tribunal to different states would be very difficult, because only a few states have the capacity to perform all residual functions of the Tribunals and it is unlikely that one of these would take on such a burden. Furthermore, it is would be questionable whether such states would have the authority to perform residual functions toward external entities, other states, the UN, and foreigners. A possible solution could be to oblige all states and other entities by a Chapter VII resolution to cooperate with the state, but it is doubtful that this would work. Also, the review of the earlier conviction of the Tribunals' high-level accused by a national court would be incongruous.

However, in general very few states are willing and able to undertake the expensive and complex trials. In 2006, the first request for transfer was filed by the Prosecutor of the ICTR in the case against Michael Bagaragaza.[1] The Prosecutor suggested Norway as the country of destination, but the Trial Chamber and the Appeals Chamber rejected this

[1] *Prosecutor v. Michael Bagaragaza (*Case No. ICTR-2005-86-R11bis), Decision on the Prosecutor's Motion for Referral to the Kingdom of Norway, 19 May 2006.

request.[2] Afterwards, the case of Michel Bagaragaza was transferred to the Netherlands for trial. But the Netherlands determined that they had no jurisdictional basis to try this case.[3] This shows the difficulties encountered by the ICTR when attempting to transfer cases to national courts. The ICTR Prosecutor secured the cooperation of only a few countries. Beside Norway and the Netherlands, the only two states that agreed to accept cases were Rwanda and France.[4] France agreed to take over the cases of Laurent Bucyibaruta and Wenceslas Munyeshyaka, who were residing in France.[5] At the Prosecutor's request, these two cases were officially referred to France. But explorative talks with other states were unsuccessful. However, the ICTR was faced with difficulties when consulting national authorities to envisage the transfer of cases, including the lack of national legislation to allow prosecution of individuals for the crimes committed in Rwanda. Other states investigated the cases and decided not to pursue them, because judicial systems were already overstretched and therefore unable to cope with additional cases.[6] Therefore, most of the cases that had to be transferred to domestic courts would had nowhere to go but Rwanda. It would have been even more difficult to find a state that would completely take over the trial function of the Tribunals. And referring the cases to different national authorities would result in different application of the Tribunals' jurisdiction, leading to an uncertain legal situation that could result in a violation of the accused's rights. The legacy of the Tribunals' jurisprudence would be in danger.

3. Transferring the Residual Functions to the ICC

It is questionable whether a transfer to the ICC would be an option. At the time the Residual Mechanism was established, the ICC was discussed as a possible future host institution for the joint ICTY, ICTR, and SCSL Residual Mechanism. The possibility was raised to simply incorporate the residual functions into the role and function of the ICC, so that the ICC would perform all the residual functions in its own name.[7]

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[2] Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 177.

[3] *Prosecutor v. Michael Bagaragaza (*Case No. ICTR-2005-86-R11bis), Decision on the Prosecutor's Motion for Referral to the Kingdom of Norway, 19 May 2006, para. 873.

[4] Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 178; Jean-Pele Fomete 'De l'articulation entre le national et l'international' African Yearbook of International Law (2008), p. 134.

[5] Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 178.

[6] Ibid.

[7] U.N. SCOR, 5697th mtg. at 16-17, U.N. Doc. S/PV.5697 (June 18, 2007) (Statement by Mr. Arias (Pan.)); Valerie Oosterveld, 'The International Criminal Court and The Closure of the Time-limited International and Hybrid Criminal Tribunals' Loy. U. Chi. Int'l L. Rev. 8 (2010) 13, 23.

A. The Legal Basis of the ICC

The ICC is a permanent and independent international court with its headquarters in The Hague. It is a separate and distinct international legal entity and has been operational since 1 July 2002, when the Rome Statute of the International Criminal Court (Rome Statute) came into force.[8] According to Article 34 of the Rome Statute, the court comprises the following organs: Presidency, Trial Division, Appeals Divisions, Pre-Trial Division, the Office of the Prosecutor and the Registry.[9] The Assembly of State Parties[10] of the ICC consists of all the nations that have ratified or acceded the Rome Statute.[11] When becoming party to the Rome Statute, the state becomes a member state of the ICC.[12] But it is important to note that even though all the states of former Yugoslavia are a party to the Rome Statute, Rwanda is not. This makes it more difficult to transfer the residual functions of the ICTR to the ICC. Additionally, BIH did not even sign the Agreement on the Privileges and Immunities of the International Criminal Court until January 2012.[13]

A difference between the legal basis of the ICC and that of the Tribunals as well as the Residual Mechanism is problematic. The Tribunals and the Residual Mechanism were established on the basis of Chapter VII of the UN Charter, whereby the Rome Statute is a multilateral treaty. The relationship of the ICC with the UN as well as the Security Council differs significantly from that of the Tribunals and the Residual Mechanism.[14] The ICC was not established by and is not an organ of the Security Council. But the Negotiated Relationship Agreement between the ICC and the UN defines the cooperation between the institutes and confirms the unique role of the Security Council in the Courts' operations. Therefore, the two institutions have to respect each other's status and mandate. [15] However, the independence of the ICC is a paramount characteristic of its existence.

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[8] Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90; See more on the establishment of the ICC: Javaid Rehman, *International Human Rights Law* (2nd ed, Longman, 2009), pp. 725-727; William Schabas *Introduction to the International Criminal Court* (2nd ed, Cambridge University Press, 2004) pp. 1- 13; P.D. Marquardt, 'Law without Borders: The Constitutionality of an International Criminal Court' Col. JTL 33 (1995) 73; Kai Ambos, 'Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint' EJIL 7 (1996) 519, 521; John Dugard, 'Obstacles in the way of an International Criminal Court' CLJ 56 (1997) 329, 333; Lyn Stevens, 'Towards a Permanent International Criminal Court' EuJCCC 6 (1998) 236; Phillipe Kirsch and John T. Holmes 'The Rome Conference on an International Criminal Court: The Negotiating Process' AJIL 93 (1999) 2; Roy Lee, 'The Rome Conference and Its Contributions to International Law, in Lee (ed.) *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (The Hague, Kluwer Law International 1999), pp. 1- 39.

[9] See more on structure: Javaid Rehman, *International Human Rights Law*, see note 8, pp. 727-728. William Schabas *Introduction to the International Criminal Court*, see note 8, pp. 176- 192.

[10] The first ASP convened in New York City, at the United Nations headquarters, on 3 September 2002. Prince Zeid Raad Zeid Al-Hussein of Jordan was elected president, with Allieu Ibrahim Kanu of Sierra Leone and Felipe Paolillo of Uruguay as vice-presidents.

[11] Article 112 of the Rome Statute.

[12] Currently, there are 124 states from around the globe that are party to the Rome Statute and therefore members of the ICC.

[13] Agreement on the Privileges and Immunities of the International Criminal Court, New York, 9 September 2002, UN Doc. ICC-ASP/1/3, at 215, and Corr. 1 (2002); See: Phakiso Mochochoko, 'The Agreement on Privileges and Immunities in the International Criminal Court' Fordham Int'l L.J 25 (2002) 638.

[14] See e.g. ICC Statute arts 2, 5-33, 53(2) and (3), 87(5) and (7), and 115; Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004, ICC-ASP/3/Res.1.

[15] Article 3 of the Negotiated Relationship Agreement between the International Criminal Court and the United Nations, 4 October 2004, ICC-ASP/3/Res.1; According to the relationship agreement the parties agreed that 'with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute'.

B. Principle of Complementarity with National Criminal Jurisdiction

The difference in jurisdiction between the ICC and the Tribunals as well as the Residual Mechanism is problematic.[16] A key difference is that the jurisdiction of the ICC is based on the principle of Complementarity with national criminal jurisdiction. The ICC is a court of last resort and rules otherwise inadmissible cases.[17] The objective is to strengthen the capacities of national courts to prosecute atrocity crimes. When a situation is referred to the ICC, the Prosecutor notifies the nation that normally would exercise national jurisdiction over the atrocity crimes covered by the referral.[18] But the Rome Statute does not require such notification to states when the Security Council refers the situation to the court acting under Chapter VII authority in connection with a threat to or breach of international peace and security. Further, under Article 17 (1) (a)-(d) of the Rome Statute it is upon the ICC to decide whether to proceed with the trial. The court determines that a case is inadmissible in the cases of Article 17 (1) (a)-(d) of the Rome Statute. So it is inadmissible if a state with jurisdiction over the case is investigating or prosecuting it, unless the state is 'unwilling or unable genuinely' to carry out the investigation or prosecution. The state is unable to prosecute the case only when there is an indication of 'a total or substantial collapse or unviability of the state's judicial system.'[19] This possibility only appears if a nation failed or is a country totally divested in the wake of war or atrocities.[20] Therefore, states parties have the primary responsibility and the preferred

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[16] G. Gaja, ' The Long Journey towards repressing Agression' in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary' Volume I* (Oxford University Press, Oxford 2002), pp. 427-441; David Scheffer, *State Parties Approve New Crimes for International Criminal Court* (ASIL Insight, Wash. D.C. 2010), p. 10; Cale Davis, Susan Forder, Tegan Little and Dali Cvek, 'The Crime of Aggression and the International Criminal Court' The National Legal Eagle 17 (2011) 11,12; Matthew Gillett, 'The Anatomy of an International Crime: Aggression at the International Criminal Court' Int'l Crim. L. Rev.13 (2013) 829; Roger S. Clark, 'Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May – 11 June 2010' GoJIL 2 (2010) 689, 693-695; Beth Van Schaack, 'Negotiating at the Interface of Power & Law: The Crime of Aggression' Colum. J. Transnat'l L. 49 (2011) 505; Report of the Special Working Group on the Crime of Aggression (ICC-ASP/6/20/Add.1/Annex II); Michael Anderson, 'Reconceptualising Aggression' Duke L.J. 60 (2010) 411, 412-413, 418; Antonio Cassese, 'On Some Problematic Aspects of the Crime of Aggression' Leiden J Int'l L. 20 (2007) 841, 846; Claus Kress, 'The ICC Review Conference at Kampala: Mission accomplished or Unfulfilled Promise' JICJ 8 (2011) 1179, 1191; Keith Petty, 'Criminalizing Force: Resolving the Threshold Question for Crime of Aggression in the Context of Modern Conflict' Seattle U L Rev 33 (2009) 105, 120; Keith Petty, 'Sixty Years In The Making: The Definition of Aggression for the International Criminal Court' Int'l. & Comp. L. Rev. 31 (2008) 531, 548; David Scheffer 'The International Criminal Court' in William Schabas and Nadia Bernaz (eds.) *Routledge Handbook of International Criminal Law* (Routledge, Taylor & Francis Group, Abingdon and New York 2011), p. 70: Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277; William Schabas 'Genocide in International Law' (2nd edn, Cambridge, Cambridge University Press 2009), pp. 454- 461; Antonio Cassese 'Genocide' Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.) *The Rome Statute of the International Criminal Court: A Commentary' Volume I* (Oxford University Press, Oxford 2002), pp. 340- 347; Antonio Cassese *International Criminal Law* (2nd edn, New York, Oxford University Press 2008), p. 146; Stéphane Bourgon, 'Jurisdiction ratione loci' in Antonio Cassese, Professor Paola Gaeta, and Mr John R.W.D. Jones 'The Rome Statute of the International Criminal Court' (Oxford University Press, Oxford 2002), pp. 559- 570; Stéphane Bourgon 'Jurisdiction ratione temporis' in Antonio Cassese, Professor Paola Gaeta, and Mr John R.W.D. Jones 'The Rome Statute of the International Criminal Court' (Oxford, 2002), pp. 543- 558; William Schabas *Introduction to the International Criminal Court (*2nd ed., Cambridge University Press, Cambridge 2004), p.70.

[17] For a detailed description of admissibility issues see ICC Statute arts 17-19. See also ICC Statute art 1.; Ruth B. Philips, 'The International Criminal Court Statute: Jurisdiction and Admissibility', Criminal Law Forum 10 (1999) 77; John T. Holmes, 'The Principle of Complementary' in Roy Lee (ed.) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague, Kluwer Law International 1999), pp. 41- 78; Per Saland, 'The International Criminal Law Principles' in Roy Lee (ed.) *The International Criminal Court*, *The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague, Kluwer Law International 1999), pp. 189- 216.

[18] Article 18 (1) of the Rome Statute.

[19] Article 17 (3) of the Rome Statute.

[20] John T. Holmes, 'The Principle of Complementary' in Roy Lee (ed.) *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague, Kluwer Law International 1999), pp. 75-76; David Scheffer 'The International Criminal Court' in William Schabas and Nadia Bernaz (eds.) *Routledge Handbook of International Criminal Law* (Routledge, Taylor &

forum for trial to prosecute the accused in their own courts. But under Articles 17 (2) (a)-(c) of the Rome Statute and 17 (3) of the Rome Statute the Courts jurisdiction can be re-established in circumstances where the national court is unwilling or unable to prosecute an individual.

Therefore, the question arises as to whether the ICC would be able to demonstrate that the domestic systems of Rwanda and the states of former Yugoslavia are unwilling or genuinely unable to carry out the investigation or prosecution of these cases. Rwanda and the states of former Yugoslavia are willing to prosecute the cases regarding the conflicts. The requirement of inability in a case, which only arises when there is a total or substantial collapse or unviability of the state's judicial system, would not be met anymore. The conflicts in both regions took place are relatively long time ago. This has allowed Rwanda and the states of former Yugoslavia to rebuild their judicial systems. Therefore, the principle of Complimentary with national criminal jurisdiction would be an obstacle for the ICC in taking over the prosecution of the Tribunals' cases.

C. Amending the Rome Statute

It is a complicated process to seek amendments to the Rome Statute. According to Articles 121-123 of the Rome Statute, proposals need the consent of the states parties. If there is no consensus among the states, approval by a two-thirds majority is necessary. Article 122 of the Rome Statute particularly regulates amendments to provisions of an institutional nature.[21] For the states parties, the amendment would enter into force one year after the amendment was approved by seven-eighths of the states parties. According to Article 121 (1) of the Rome Statute, amendments during the first seven years from the entry into force of the Statute are excluded in general. Therefore, this would be impossible as a short- to medium-term option. But there are further potential obstacles. Some states parties but also states that are not party to ICC Statute and whose approval in the Security Council is required for the transfer could be against the idea of transferring the residual functions of the Tribunals to the ICC. A possible obstacle would be the expense of the ICC associated with the transfer of residual functions. But arrangements could be made to guarantee that the states parties but also other donors do not have to bear the extra costs. Articles 115 and Article 116 of the Rome Statute declare that the state parties' voluntary contributions and funds provided by UN cover expenses of the ICC. Article 32 of the ICTY Statute regulates that expenses of the ICTY are borne by the regular budget of UN and according to the

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Francis Group, Abingdon and New York 2011), p. 75. William Schabas *Introduction to the ICC* (4th edn, Cambridge University Press, Cambridge 2011), p. 85-89.

[21] For example Article 35, Article 36, (8) and (9), Article 37, Article 38, Article 39, (1) (first two sentences), (2) and (4), Article 42, (4) to (9), Article 43, (2) and (3), and Articles 44, 46, 47 and 49.

annual report of the ICTY voluntary contributions exist as well.[22] For example, the expenses concerning the Charles Taylor trial were funded by the SCSL. Therefore, arrangements could be met to guarantee that states parties do not have to bear the extra costs resulting from to the ICC carrying out the residual functions.

D. Different Options for the ICC to Carry Out Residual Functions

There are different options when considering the ICC to carry on the Tribunals' residual functions.[23] The potential role of the ICC ranges from the ICC continuing all or only some of the Tribunals' residual functions in its own name to a residual mechanism only using the facilities of the ICC. In addition, variations of each of these options are possible that could be used in combination, for example, the ICC performing only a couple of residual functions or ICC staff working on a part-time or ad hoc basis. Transferring the residual functions to the ICC seems to be a potential solution because the ICC is permanent, has jurisdiction over the same general types of crimes and provides experts who understand how to track fugitives, oversee sentence enforcement, protect witnesses, preserve and protect archives. But issues appear when considering any role for the ICC. [24] On the one hand, carrying on the residual functions could strengthen the ICC as a permanent international criminal court. But on the other hand, the ICC needs to focus on its core mandate and sorting out its own problems, especially considering that the ICC's workload is increasing.

Oosthuizen analysed different opinions of decision-makers, stakeholders, and experts regarding the potential role of the ICC.[25] According to Oosthuizen, opponents of the ICC do not want the ICC to take over residual functions because the court could possibly gain in stature and importance.[26] Further, considering the role of the Tribunals as

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[22] ICTY 2006/7 annual report pars 113-116, which refer to voluntary contributions as well.

[23] Coalition for the International Criminal Court, Non-paper, Work in Progress, Residual Functions and the ICC, 30 Aug 2007, pp 2-3: 'For several reasons, including the breadth of its own caseload, and jurisdictional, statutory, and practical roadblocks, the ICC may not be capable of assisting these institutions in their judicial and/or prosecutorial functions'; International Center For Transitional Justice, University of Western Ontario Faculty of Law, Permanent Mission of Canada to the United Nations, Final Report of the Expert Group Meeting on 'Closing the International and Hybrid Criminal Tribunals: Residual Mechanisms to Address Residual Issues, (Mar. 24, 2010), para. 9; Gabriël Oosthuizen, 'Draft Briefing Paper: The residual functions of the UN international criminal tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone: the potential role of the International Criminal Court' (2008) International Criminal Law Services, paras. 40- 42.

[24] Coalition for the International Criminal Court, Non-paper, Work in Progress, Residual Functions and the ICC, 30 Aug 2007, pp. 2-3: 'For several reasons, including the breadth of its own caseload, and jurisdictional, statutory, and practical roadblocks, the ICC may not be capable of assisting these institutions in their judicial and/or prosecutorial functions'; International Center For Transitional Justice, University of Western Ontario Faculty of Law, Permanent Mission of Canada to the United Nations, Final Report of the Expert Group Meeting on 'Closing the International and Hybrid Criminal Tribunals: Residual Mechanisms to Address Residual Issues, (Mar. 24, 2010), para. 9.

[25] Gabriël Oosthuizen, 'Draft Briefing Paper: The residual functions of the UN international criminal tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone: the potential role of the International Criminal Court' (2008) International Criminal Law Services, para. 40- 42. Only a few of those decision-makers, stakeholders and experts who have been interviewed agreed to be identified, including Fausto Pocar (President of the ICTY), Valerie Oosterveld (Assistant Professor on the University of Western Ontario Faculty of Law in Canada), Mariana Pena (Liaison Officer to ICC, La Fédération Internationale des Droits de l'Homme), Wasana Punyasena, Christopher Staker (Deputy Prosecutor of the SCSL), William Roelants de Stappers (Legal Adviser to the Permanent Mission of Belgium to the UN), Herman von Hebel (Registrar of the SCSL).

[26] Ibid., para. 42 (i).

paramount, it is questionable whether the ICC is strong enough or has the experience required to perform the Tribunals' residual functions. It is also questionable whether residual functions would be properly prioritised. Another issue is whether the ICC, which does not have experience concerning the relevant law of armed conflict, would be able to carry on residual functions in the best interest of convicts and accused, victims and witnesses, and the states of former Yugoslavia and Rwanda. It is doubtful whether putting the appropriate structures in place and involving the staff of the Tribunals in any ICC role could address these concerns.[27] Also problematic from a political perspective would be the relationship of the ICC and the Security Council as well as the link of the Security Council with the Tribunals. For example, the role of the Security Council in global affairs could be extended so that the ICC could help the Security Council in completing the work of Security Council organs.[28] Also worth consideration is that an additional link between the ICC and the Security Council or its organs could jeopardize the ICC's independence. Therefore, the role of the Security Council needs to be limited. According to Oosthuizen, some ICC states parties who see the Tribunals as western-dominated entities have reservations about the ICC playing any role. Some of the Security Council's permanent members, including some that are states parties to the ICC Statute and some that are not, have concerns regarding the role of the ICC in Africa.[29] Bearing in mind the enormous archives of the Tribunals, the lack of space of the ICC would be an issue.[30] Therefore, extra space would be necessary. But the ICC playing a role does not have to mean that all residual functions have to be carried out by the ICC. According to Oosthuizen, whenever the ICC would play a role in the Tribunals' residual functions, especially in the case of the ICTR, the ICC would create the possibility of having a more fixed presence in central and eastern Africa.[31] Further, it is questionable whether it would be the most practical and cost-efficient solution if the ICC were to take part in the performance of the residual functions. Thus, different options are possible when considering if the ICC should take over the residual functions.

a. Transferring All Residual Functions to the ICC

One option could be to transfer some or all of the residual functions to the ICC. The ICC would perform the residual functions in its own name. When considering transfer, the effectiveness regarding other residual functions, hierarchies of authority, and the guarantee

[27] Ibid., para 42 (ii).
[28] Ibid., para. 42 (iii).
[29] Ibid., para. 42 (v).
[30] Ibid., para. 42 (iv).
[31] Ibid.

of human rights regarding the accused need to be taken into account.[32] Difficulties appear when considering a transfer of residual functions to the ICC, because of the different law, jurisdictions, and procedures. Certain governing instruments of the Rome Statute need to be changed directly or by annexing amendments in order to be able to for the ICC to be able to carry on residual functions properly. However, the relevant amendment procedure of the Rome Statute would be extremely difficult, because the necessary amendments would go beyond mere institutional changes under Article 122 of the Rome Statute.[33]

In order to transfer all residual functions, amendments under Article 121 of the Rome Statute would be required. The review conference concerning possible amendments to the Rome Statute was held in 2010.[34] Even if the required amendments could have been agreed on in 2010, the amendments would not have come into effect before about 2014. This would have required that the states parties ratified the amendments pursuant to their constitutional procedures in two to three years. However, the ICTY branch commenced working on 1 July 2013 while the ICTR branch commenced working on 1 July 2012 (Commencement Dates). This was two years regarding the ICTR and one year regarding the ICTY prior to the entry into force of any possible amendments of the Rome Statute. However, amendments to the ICC Statute constitute a complicated process, and the outcome would not have entered into force on time. Therefore, this option would not have been able to replace the establishment of the Residual Mechanism in general. Although it would still be possible to transfer all residual functions to the ICC, the needed amendments to the ICC Statute would be too complex to make this option work. In addition, it is very doubtful whether the states parties would give their consent.

b. Transferring Some of the Residual Functions to the ICC

It is possible to transfer only some of the residual functions. The ICC would perform these certain functions in its own name. But at the same time, a residual mechanism would still be necessary to perform the remaining residual functions of the Tribunals. It is not possible to consider the different functions in isolation because this would result in expensive and ineffective solutions. The entity that carries on the residual functions needs to be transparent and effective. Further, it has to be vested with legal authority. According to Oosthuizen, a decisive criterion is whether the required hierarchies of authority can be

[32] Ibid., para. 27 (xi).
[33] Article 122 (1) of the Rome Statute refers to Article 35, Article 36, para. 8 and 9, Article 37, Article 38, Article 39, para. 1 (first two sentences), 2 and 4, Article 42, para. 4- 9, Article 43, para 2 and 3, and Articles 44, 46, 47 and 49.
[34] Resolution ICC-ASP/6/Res.2, Strengthening the International Criminal Court and the Assembly of States Parties, 14 December 2007, para. 53.

achieved among the entities responsible for carrying on the different residual functions.[35] In particular, the judicial determinations need to be binding.

However, transferring only some of the residual functions raises further important issues. First, the different residual functions of each of the Tribunals are closely intertwined, making it difficult to identify any major residual function that could be separated from the other residual functions and transferred to the ICC to be performed independently. On the other hand, transferring just a single, simple residual function would raise questions about the purpose of such a transfer. Second, in order to transfer any major residual function to the ICC, an amendment in accordance with Article 122 of the Rome Statute would be required. However, this seems to be an insurmountable obstacle, because the amendments in accordance with Article 122 of the Rome Statute would not allow the transfer of any major residual function. Therefore, having ICC judges, prosecutors and registry staff performing residual functions in their capacity as ICC staff and in the name of the ICC appears to be an unrealistic option.

c. Outsourcing Residual Functions to the ICC

Another possible option would be to outsource some residual functions of the Tribunals or parts of such functions to the ICC. According to Oosthuizen, this means that ICC staff would perform the functions in the name of the relevant residual mechanism at The Hague or in the name of the ICC. But the relevant Residual Mechanism would be responsible for the proper performance of the outsourced function and retain the authority to reverse the outsourcing.[36] When considering outsourcing the residual functions, the effectiveness regarding other residual functions, hierarchies of authority, and the human rights of affected parties needs to be ensured. Also regarding the option of outsourcing, it should be taken into consideration that the different residual functions and their components are intertwined. Further, hierarchies between the authorities responsible for performing different residual functions need to be clarified.[37]

However, in order to outsource any major residual function to the ICC an amendment in accordance with Article 121 of the Rome Statue would be necessary. This includes certain components of the residual functions; for example, an amendment would be required when the ICC judges review cases or want to make decisions regarding sentence-commutation matters referred by a residual mechanism. The ICC judges would

[35] Gabriël Oosthuizen, 'Draft Briefing Paper: The residual functions of the UN international criminal tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone: the potential role of the International Criminal Court' (2008) International Criminal Law Services, para. 42 (iv).
[36] Ibid., para. 27 (xi).
[37] Ibid., paras. 52-53.

need to make themselves familiar with a large quantity of the case materials. The Rome Statute appears not to allow the ICC to perform a major residual function in its own name or in the name of a residual mechanism. It is not possible for the ICC, as an independent court, to carry out the residual functions of an external entity such as a residual mechanism. To continue a residual function, the ICC is required to have authority vis-à-vis third parties including states that are not ICC states parties, such Rwanda. States as well as other entities could be obligated to work with the ICC in performing certain residual functions, possibly by Security Council resolution according to Chapter VII of the UN Charter.[38] But amendments to governing instruments would be necessary as well.

Regarding the option of outsourcing, an amendment pursuant to Article 121 of the Rome Statute seems to be an insurmountable obstacle. And amendments in accordance with Article 122 of the Rome Statute would not allow the outsourcing of any major residual function. Further, it is not possible to identify any major residual function that could be separated and outsourced to be performed separately from the Residual Mechanism. However, outsourcing only a minor residual function would not be efficient.
It is questionable whether it would be an option to outsource a major residual function or a component of a residual function without amending the Rome Statute. For example, the storage of some of the archives could be outsourced, but the Residual Mechanism would remain responsible for their preservation, management, and access. Also, the function to organise the travel of witnesses could be transferred. If all decision-makers were to agree, it would be possible to outsource such minor residual functions without any Rome Statute amendment.[39] It depends on the concrete responsibility and component of the residual function. However, the amendment of other governing instruments would still be required. This would include the relationship agreement between the ICC and the UN.

d. ICC Staff Operating Double-Hatting

A possible solution could be that the ICC judges, prosecutors and registry personnel perform residual functions on an ad hoc or part-time basis, not as ICC staff but as staff of the Residual Mechanism.[40] Technically, this solution would not include a transfer of the residual functions but rather the continuation of the Tribunals. The ICC staff would be paid by and worked for in the name of the Residual Mechanism. Further, it would apply the procedures and the law of the Residual Mechanism. However, this option would not require an amendment in accordance with Article 121 of the Rome Statute, because no

[38] Ibid., para. 54.
[39] Ibid., para. 55.
[40] Ibid, para. 57.

amendments regarding the crime definitions, jurisdiction, procedures, and structures of the ICC would be needed. However, it depends on certain residual functions whether an amendment pursuant to Article 122 of the Rome Statute would be required instead. Further, amendments of governing instruments, like the ICC Rule of Procedure and Evidence or other ICC regulations, would be necessary.[41] The relevant amendments pursuant to Article 122 of the Rome Statute are easier to implement. But the idea of ICC staff preforming a double function would raise an issue regarding the spare time of the ICC staff. According to Oosthuizen, concerns appear regarding the additional burden that this solution would put on the managers of ICC teams.[42] Volume concerning the residual functions work is high. The priority of the ICC staff is to concentrate on the duties regarding the ICC.[43] The proper performance of the residual functions could fade into the background, which would put the Tribunals' legacy on risk. The ICC would need to recruit staff in order to be able to operate the double function and to properly perform both tasks. Further, it is doubtful whether the ICC staff would perform the residual functions better than the Tribunal's staff because of their lack of experience regarding the Tribunals' cases. Therefore, this option would not be more efficient.

e. Using the Facilities of the ICC

Another option could be to seek an agreement with the ICC to use the facilities of the court in order to perform residual functions.[44] For instances, Charles Taylor is being detained in the ICC detention facility. His trial was moved to The Hague because of special security considerations.[45] The trial was taking place before the SCSL using the facilities of the ICC. But according to Oosthuizen, some state parties were not keen on the ICC hosting the trial of Charles Taylor.[46] According to Articles 2 (2) and 2 (3) of the 2006 Memorandum, the ICC provides the SCSL with facilities and services, but only to the extent that the functioning of the ICC is not negatively affected. And in the event of any irreconcilable conflict between the ICC and the SCSL, the interests of the ICC take priority. In addition,

[41] Ibid., para. 53; International Criminal Court, Rules of Procedure and Evidence, 3-10 September 2002, ICC-ASP/1/3 and Corr.1, part II.A. For example: Article 51 of the Rome Statute, Rule 3 of the ICC RPE, Article 52 of the Rome Statute, Article 44(3) of the Rome Statute, Rule 9 of the ICC RPE, Rule 14 of the ICC RPE.

[42] Gabriël Oosthuizen, 'Draft Briefing Paper: The residual functions of the UN international criminal tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone: the potential role of the International Criminal Court' (2008) International Criminal Law Services, para. 62.

[43] Article 40 of the Rome Statute.

[44] Ibid., para. 63-67.

[45] *Prosecutor v. Taylor*, Decision on Defence Oral Application for Orders Pertaining to the Transfer of the Accused to The Hague, SCSL-03-1-PT, Trial Chamber II, 23 June 2006; UN Security Council Resolution 1688 (2006) UN Doc. S/RES/1688 (2006) 16 June 2006; Memorandum of Understanding regarding Administrative Arrangements between the International Criminal Court and the Special Court for Sierra Leone, ICC-PRES/03-01-06, 13 April 2006; Headquarters Agreement between the Kingdom of the Netherlands and the Special Court for Sierra Leone, DJZ/VE-262/06, 19 June 2006.

[46] Gabriël Oosthuizen, 'Draft Briefing Paper: The residual functions of the UN international criminal tribunals of the former Yugoslavia and Rwanda and the Special Court for Sierra Leone: the potential role of the International Criminal Court' (2008) International Criminal Law Services, para. 37.

the SCSL has to reimburse the ICC for all costs that appear as a result of providing agreed facilities and services.[47] Therefore, the SCSL deposits all funds in advance in a trust fund created by the ICC. This also includes expenses regarding the salaries of ICC staff that have to manage the use of the ICC facilities and expenses regarding depreciation in the value of the property and equipment of the ICC. However, the SCSL only uses the courtroom, archiving, and detention facilities of the ICC.[48] According to the agreement, the ICC provides courtroom usage time, including court reporting services, 'satellite video link capability, safe keeping of evidence, and use of vaults'. [49] But the SCSL also uses its own offices close to the ICC, while the ICC provides overall security regarding the detainee.[50]

The Tribunals could enter into similar arrangements. The Assembly of State Parties indicated a willingness to consider this option when in November 2009, the Assembly of State Parties adopted a resolution encouraging the ICC to 'continue the dialogue with other international courts and tribunals to assist with their planning on residual issues' and to report to the Assembly of State Parties on this dialogue.[51] The ICTY was already seated in The Hague. The main advantage of this option would be the saving of costs. But this depends on how much the Residual Mechanism would use the ICC facilities and to which entity the remaining residual functions of the Tribunals would be transferred. For example, the residual function regarding the protection of victims and witnesses could be performed in the affected countries. But this would require monitoring of the national institution to ensure the safety of the victims and witnesses. This approach would not be feasible because separating the residual functions would place the proper performance of the functions in danger. Therefore, it would be necessary to perform all the residual functions at the ICC facilities. The main issue with this solution would be the availability of ICC facilities, which are well occupied.[52] The residual functions will be most demanding in the first few years after the Tribunals finished their mandates. But the idea to use the facilities of the ICC after the workload has been reduced is also not practicable. The facilities for the two branches have already been set up. If the two branches were to be moved, the advantage of cost-savings would disappear. The costs of moving to The Hague must not be underestimated, especially regarding the ICTR branch.

[47] Article 3 of the 2006 Memorandum; see Articles 12 and 18 of the 2006 Memorandum.
[48] Articles 5- 7 of the 2006 Memorandum.
[49] Article 5 of the 2006 Memorandum.
[50] Article 7 of the 2006 Memorandum.
[51] International Criminal Court, Strengthening the International Criminal Court and the Assembly of States Parties, para. 3, ICC-ASP/8JRes.3 (2009).
[52] Coalition for the International Criminal Court, Non-paper, Work in Progress, Residual Functions and the ICC, 30 August 2007, pp. 4-7.

4. Concluding Remarks

Different options exist to carry on the residual functions after the Tribunals' closure. But all residual functions are closely intertwined. Therefore, it would be impossible to transfer all residual functions to different international entities, because it would be very difficult to establish links and hierarchies of authority between different states and organisations. Transferring all the residual functions of both Tribunals to one national or international body would be very difficult, because only few states or international entities have the capacity to perform all residual functions of the Tribunals, and it is unlikely that one of these would take on such a burden. In the case of Rwanda, it was even difficult to find a state, other than Rwanda that would accept referrals of cases from the ICTR. In addition, the Residual Mechanism needs to have the power to issue decisions, which are binding for states, other entities, and individuals when needed. This could only be achieved by obliging all states and other entities by a Chapter VII resolution to cooperate. A potential international body with the capacity to perform the residual functions is the ICC. The ICC could have played and still could play different roles in the performance of residual functions. Although the Residual Mechanism is established, it would be possible to transfer residual functions to the ICC. But there are important legal differences between the ICC and the Tribunals. The ICC has different temporal and geographic jurisdiction, some of the crimes are differently defined in the Rome Statute, Rwanda is not a state party to the Rome Statute and the procedures used by each of the Tribunals differ from those of the ICC.[53] None of the options would be more feasible regarding political, policy, legal, financial and practical questions than creating the independent Residual Mechanism. For the ICC to perform residual functions in its own name, amendments under Article 121 of the Rome Statute would be necessary. This would be very complicated, and makes a complete absorption of residual functions by the ICC unrealistic. Even considering the option to only use the ICC facilities and ICC staff would raise many problems. The potential obstacles and efforts to avoid them, the necessary amendments of the ICC provisions, and the time required to make agreements between the decision-makers would make it very difficult for the ICC to play a role in the residual functions. In addition, the Residual Mechanism already has its own staff and facilities. This path was and still is impracticable. Furthermore, the Residual Mechanism with one branch seated in Arusha offers logistical advantages and ensures a fixed presence in eastern and central Africa.

[53] International Criminal Court, R. PROC. & EVID., paras. 121-26, available at http://www.icc-cpi.int/ NR/rdonlyres/FIEOAC IC-A3F3-4A3C-B9A7-B3E8Bl11 5E886/140164/Rules ofprocedureandEvi- denceEnglish.pdf (last visited on 11 April 2017). The RPE of the ICTY, ICTR, and SCSL differ slightly from each other, but differ significantly in many aspects from the RPE of the ICC. For example, the ICC's Rules cover a procedure called a 'confirmation of charges' hearing that is not a procedure used by any of the time-limited tribunals.

VI. A Joint Residual Mechanism as the Preferable Solution

It is questionable whether it would have been a preferable solution to create a joint Residual Mechanism that takes over the residual functions of the SCSL, the ICTY, and the ICTR.

1. Differences and Similarities between the SCSL and the Tribunals

The ICTY and the ICTR are in effect joined at the hip, because the Tribunals share some of their institutions and have identical Statutes. The Prosecutor and the composition of the Appeals Chamber are the same for both Tribunals. This leads to consistency regarding prosecutorial policy and appellate jurisprudence. In 2000, the Statute of the ICTR was amended in order to allow the appointment of two appellate judges. The judges sit in The Hague. Working with five colleagues from the ICTY, they make up the Appeals Chamber of the ICTY and ICTR.[1]

The question appears of whether it would have been possible to create a joint Residual Mechanism, because the treaty-based nature of the SCSL differs from the Tribunals in important aspects. The SCSL was held inside Sierra Leone rather than in a third country. Therefore, the Sierra Leonean government had significant involvement regarding the administration. In addition, the SCSL Statute applies international as well as Sierra Leonean law. Therefore, the SCSL needed to be incorporated into the law of Sierra Leone. Another important difference is that the Security Council and the UN supported the SCSL less financially than the Tribunals. However, payments to the SCSL were voluntary as opposed to the mandatory method of assessing payments for Tribunals.[2] In contrast to the SCSL, which had concurrent jurisdiction with Sierra Leonean Courts, the Tribunals have primacy over national courts. While the SCSL only had jurisdiction over crimes committed after 7 July 1999, the jurisdiction of the ICTR is limited to the period of the genocide, from January 1994 through December 1994.[3] But the jurisdiction of the SCSL is similar to the unlimited jurisdiction of the ICTY.[4] These differences in temporal jurisdiction exist because the conflicts in Sierra Leone and former Yugoslavia lasted longer than the genocide in Rwanda. Regarding individual criminal responsibility, the language in the SCSL Statute is nearly identical to that of the Tribunals.[5] However, the individual criminal responsibility described in Article 5 of the SCSL Statue has to be determined in

[1] UN Security Council Resolution 1329 (2000), UN Doc. S/RES/1329 (2000), 5 December 2000; William Schabas *Introduction to the International Criminal Court* (2nd ed., Cambridge University Press, Cambridge 2004), p. 12.
[2] *Letter from the Secretary-General addressed to the President of the Secretary Council,* U.N. Doc. S/2001/40, 12 January 2001, paras. 10-13.
[3] Article 7 of the ICTR Statute; Article 1 (1) of the SCSL Statute.
[4] Article 8 of the ICTY Statute.
[5] Article 1 of the SCSL Statute, Article 6 of the ICTR Statute, Article 6 of the ICTY Statute.

accordance with Sierra Leonean law. A comparable domestic legal provision does not exist in the cases of the ICTY and the ICTR.[6]

Unlike the Tribunals, which have the power to request assistance from third states, or the ICC, which can request assistance from any member of the treaty, the SCSL did not have the power to demand assistance from a third country.[7] Another result of the bilateral nature of the SCSL is that an accused person could be tried in a court outside of Sierra Leone. Furthermore, an accused person could also be retried for a crime by the SCSL under Articles 2 through 4 of the SCSL Statute even if the accused was already tried in a Sierra Leonean national court.[8] Therefore, the SCSL has the power to try the accused already tried in Sierra Leone if the Prosecutor thinks there was a sham trial or a weak investigation. The Tribunals can request that a national court defer prosecution of individuals if the Tribunal is interested in trying them.[9] The subject matter jurisdiction of the SCSL is similar to the Tribunals' Statutes. But genocide was not included on the list of crimes, since the attacks on civilians in Sierra Leone did not appear to have an ethnic element. There are two primary ethnic groups in Sierra Leone, the Mende and the Temne. Both suffered during the conflict. Because of the unique bilateral arrangement, crimes under Sierra Leonean law are included in the Statute. In contrast, the ICTR and ICTY do not provide jurisdiction for crimes committed under Rwandan and Yugoslavian law. The structure of the SCSL and the Rules of Procedure and Evidence are similar to those of the Tribunals. This results from the fact that the Rules of Procedure and Evidence were mostly copied from the ICTR RPE. Further, the Appellate Chamber was guided by decisions of the Tribunals' Appeals Chambers and the Supreme Court of Sierra Leone in the application of the laws and legal principles of Sierra Leone.[10]

2. Residual Functions of the SCSL

Since 2007, the Office of the Registrar of the SCSL was specifically tasked with identifying legal, judicial, and administrative functions that need to be carried on by an appropriate Residual Mechanism.[11] Although the Tribunals differ from the SCSL in some aspects, the issues and challenges the SCSL faces regarding its continuing legal and

[6] Article 7 of the ICTR Statute; Article 8 of the ICTY Statute.
[7] Article 7 of the ICTR Statute, Article 8 of the ICTR Statute; Article 8 of the ICTY Statute, Article 9 of the ICTY Statute; Article 13 of the Rome Statute; Article 12 (1) (a) of the SCSL Statute.
[8] Article 9 (2) of the SCSL Statute.
[9] Article 8 (2) of the ICTR Statute; Article 9 (2) of the ICTY Staute. Michaela Frulli, 'The Special Court for Sierra Leone: Some Preliminary Comments' Eur. J. Int'l L. (2000) 860.
[10] Article 20 (3) of the SCSL Statute; Celina Schocken, 'Special Court for Sierra Leone: Overview and Recommendations' BJIL 20 (2002) 437, 445- 452.
[11] Binta Mansaray and Shakiratu Sanusi, 'Residual matters of ad hoc courts and tribunals: the SCSL experience' Commonwealth Law Bulletin 36 (2010) 593.

administrative obligations are similar.[12] Therefore, the SCSL convened the Residual Issues Expert Group Meeting on 20 and 21 February 2008.[13] The SCSL hired a consultant to analyse all residual issues that could arise from the completion of the judicial activities. Further, the consultant was required to examine all possible options that could be used to respond to the residual issues.

In the so-called Donlon Report, ten critical residual functions were identified and divided into two categories, 'ongoing' functions and 'ad hoc' functions.[14] While 'ongoing' functions require a small and continuous secretariat, ad hoc functions may only be required at times and may, in practice, never be required at all. The 'ongoing functions' are those that involve 'ongoing' day-to-day responsibilities and the 'ad hoc functions' may only require a 'notional' Residual Mechanism that will be called upon to perform a service as needed, which may be very rarely or in fact never performed. For the 'ongoing' functions, however, a permanent standing Residual Mechanism was necessary. The report examined the functions to determine the capacity of the Residual Mechanism needed, the workload of the Residual Mechanism assessed, and the timeline.

The following residual functions were identified: (1) The long-term maintenance and preservation of the SCSL archives needs to be guaranteed in a secure and suitable environment, including management of access to and classification of records. (2) The witness protection and support is of crucial importance and includes responding to any threats to SCSL witnesses. A substantial part of this function has to be performed in Sierra Leone. (3) Assistance to national prosecution authorities includes the management of government requests for evidence and information to support investigations, prosecutions, forfeiture proceedings and asylum cases. (4) Supervision of prison sentences, pardons, and commutations, and early releases includes inspection of the conditions of imprisonment, tracking of time served, and dates of release.

Another six functions are ad hoc functions: (5) The Trial of Johnny Paul Koroma needs to be conducted. (6) The review of convictions and acquittals has to be ensured in order to guarantee the rights of the convicted. (7) Contempt of court proceedings needs to be pursued in order to ensure respect for and implementation of court orders, as well as the need to sanction persons who violate them. (8) Dealing with Defence Counsel and legal aid

[12] Ibid.

[13] Participants in the meeting included representatives from the United Nations Office of Legal Affairs, several missions to the United Nations, ICTR, ICTY, ICC, leading international non-governmental organisations, and the international donor community. In addition, Sierra Leonean stakeholders participated in the meeting, which included involvement from local representatives of the Sierra Leone government, the Sierra Leone police, the Sierra Leone judiciary, the Sierra Leone Bar Association, and Sierra Leonean-based non-governmental organizations. SCSL, Fifth Annual Report of the President of the Special Court for Sierra Leone for the period of June 2007 to May 2008, p. 38. The report is available from the website of the RSCSL at http://www.rscsl.org/Documents/AnRpt5.pdf (last visited on 9 April 2017).

[14] Binta Mansaray and Shakiratu Sanusi, 'Residual matters of ad hoc courts and tribunals: the SCSL experience' Commonwealth Law Bulletin 36 (2010) 601.

issues. (9) Dealing with claims for compensation. (10) Double jeopardy needs to be prevented. When the SCSL has completed a prosecution, that person should not be tried again for the same offence by other courts. [15]

One of the most difficult issues was the location of the archives. The Government of Sierra Leone preferred the archives to remain in Sierra Leone. Although it could be argued that the archives belong to Sierra Leone, the archives legally belong to the SCSL. The long-term preservation and the security of the archives were very important when considering the future location. Because it was not possible to find a suitable facility in Sierra Leone the Government of the Netherlands offered to host the archives. The Government of Sierra Leone accepted the offer, but the original archives may be returned to Sierra Leone 'when there is a suitable facility for their preservation and sufficient security for maintaining the archives in accordance with international standards.'[16] In 2011, the Sierra Leone Peace Museum was launched under the recommendation of the Government of Sierra Leone, as a memorial to the war.[17] The Sierra Leone Peace Museum provides access to a complete copy of the archives of the SCSL. It honours the victims of the war and sends a strong a message to future generations about the consequences of the violent conflict.

3. Residual Special Court for Sierra Leone (RSCSL)

There were three options for carrying out the residual functions: a downsized SCSL, transferring the functions to the domestic courts in Sierra Leone, or creating a completely new independent body. According to Article 23 of the SCSL Agreement, the SCSL will be closed by agreement of the Government of Sierra Leone and the UN after the SCSL completed its judicial activities.[18] However, the parties could have decided that the SCSL has not finished its judicial activities yet. But the Government of Sierra Leone and the donors of the SCSL desired to close the SCSL, to show that the SCSL had fulfilled its mandate. In addition, creating a new body would allow to address the inefficiencies in the structure and practices of the SCSL and to come up with a new funding mechanism.

Transferring the functions to domestic courts would give ownership of the SCSL back to Sierra Leone. The judicial system of Sierra Leone had suffered great damage during the civil war. Therefore, the President asked the UN to create a court to prosecute

[15] Ibid., pp. 602-603; SCSL, Fifth Annual Report of the President of the Special Court for Sierra Leone for the period of June 2007 to May 2008, p. 38. The report is available from the website of the RSCSL at http://www.rscsl.org/Documents/AnRpt5.pdf (last visited 11 April 2017).

[16] Article 7 (3) of the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of Residual Special Court for Sierra Leone signed on the 11th August, 2010 and for other related matters (The Residual Special Court for Sierra Leone Agreement (Ratification) Act, 2011), .Sierra Leone Gazette Vol. CXLIII, No. 6 of 9 February 2012.

[17] Sierra Leone Peace Museum, availiable at http://www.slpeacemuseum.org/about-us/background.html (last visited 11 April 2017).

[18] Agreement between the the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, UNTS Volume Number: 2178, 16. January 2002.

the persons most responsible for crimes. The domestic courts still were overloaded so it would be unreasonable to impose additional work on the judicial system. Further, the judges in the domestic courts would need to familiarize with the jurisprudence of the SCSL in order to be able to review judgments, and to decide on applications for early release. Another legal issue was the Lomé Peace Accord, under which the Government of Sierra Leone granted a blanket amnesty to members of the rebel groups.[19] But the Lomé Peace Accord did not apply before the SCSL.[20] Therefore, unless the amnesty was revoked, the domestic judicial system would not have jurisdiction over the persons indicted by the SCSL. Hence, they would lack jurisdiction over the only remaining fugitive of the SCSL, Johnny Paul Koroma. Finally, the SCSL is not part of the judicial system of Sierra Leone. It was questionable whether the judiciary of Sierra Leone could review judgments issued by the SCSL, or remove confidentiality restrictions placed on SCSL documents.

The RSCSL was supported and shaped by the local population and civil society. This helps to ensure that the SCSL leaves a lasting legacy in Sierra Leone. In contrast to the Residual Mechanism, the RSCSL started its work after the SCSL shut down instead of during its last phases. In August 2010, the RSCSL was created by an agreement between the UN and the government of Sierra Leone to solve the residual issues resulting from the closure of the SCSL. The Parliament of Sierra Leone ratified the agreement in December 2011.[21] In contrast, the Security Council established the Residual Mechanism acting under Chapter VII of the UN Charter.[22] Pursuant to the RSCSL Statute, the purpose of the RSCSL is to carry out the functions of the SCSL, which have continued after the closure of the Special Court. The RSCSL is seated in Sierra Leone, where the crimes in question were committed.[23] This is advantageous because it provides increased accessibility to witnesses and victims and allows increased visibility of the court's work. This presence creates the possibility that the SCSL's work could help to recreate the justice system in Sierra Leone and serve as a symbol against impunity for horrific crimes committed in that area. In addition, it increases the access of the affected communities to the court and its archives. The RSCSL presides over ad hoc judicial proceedings, like review proceedings or contempt of court cases arising out of witness tampering. Of the 557 witnesses who

[19] Peace Agreement between the Governement of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Peace Agreement), UN Doc. S71999/777, 7. July 1999. See Article IX (2): After signing oft he present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement'. See also Article IX (3): To consolidate the peace and promote the cause of national reconcilation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement.'

[20] Article 10 of the SCSL Statute: 'An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.'

[21] Agreement between the UN and the Government of Sierra Leone on the Establishment of a Residual Special Court for Sierra Leone, Freetown 11 August 2010, with annexed Statute of the RSCSL (RSCSL Statute).

[22] UN Security Council Resolution 1966 (2010), UN Doc. S/RES/1966 (2010), 22 December 2010.

[23] Article 6 of the RSCSL Statute.

testified in SCSL proceedings, approximately 100 require ongoing post-trial witness protection.[24] The RSCSL also had the jurisdiction to try the case against the last remaining fugitive of the SCSL, Johnny Paul Koroma, but also had the option of referring the case to a competent national authority.[25] The archives of the SCSL became the property of the RSCSL and are collocated in both Sierra Leone and in the Netherlands, where the RSCSL interim seat is located. In order to preserve and promote the legacy of the SCSL, electronic access to the public archives is available to the public in Sierra Leone, along with printed copies. The archives that will be made available to the public through the Sierra Leone Peace Museum are 'one of the richest resources on the nation's conflict.'[26]

4. Concluding Remarks

Because it is located in the country where crimes were committed, the situation of the SCSL is unique. The RSCSL in Sierra Leone provides accessibility to the trials and documents for victims and witnesses and the visibility of the progressing work of the court in the country. Access to the archives is of special importance. Further, the work of the RSCSL is a possibility to rebuild the Sierra Leonean judicial system and it also serves as a symbol against impunity for atrocities committed in that area. That would be at risk if the Residual Mechanism were to have been located outside Sierra Leone. But the funding of a RSCSL was problematic. Because it is not possible for Sierra Leone to contribute to a Residual Mechanism, the international community needed to devise a sustainable funding arrangement. Therefore, it could have been an option to create a joint Residual Mechanism with the ICTR and ICTY. This Residual Mechanism would have been located outside Sierra Leone but with an office in Sierra Leone.

The legal basis of the SCSL is different from the legal basis of the ICTY and ICTR, which could make a joint Residual Mechanism complicated. However, the legal differences would not have made that option unfeasible. But when deciding on a joint Residual Mechanism the question would have been where to locate the institution. It would have been a good option to create a third branch to the ICTY and ICTR Residual Mechanism with regard to funding and efficiency. A joint Residual Mechanism could become a part of the international criminal justice landscape. Other Tribunals could also

[24] *Ninth Annual Report of the President of the Special Court for Sierra Leone for the period of June 2011 to May 2012,* p. 38. The report is available from the website of the RSCSL at http://www.rscsl.org/Documents/AnRpt9.pdf (last visited on 11 April 2017); Defna Gozani, 'Beginning to Learn How to End: Lessons on Completion Strategies, Residual Mechanisms and Legacy Considerations from Ad Hoc International Criminal Tribunals to the International Criminal Court' Loyola of Los Angeles International and Comparative Law Review Vol. 36:331 (2015), p. 360.
[25] *Ninth Annual Report of the President of the Special Court for Sierra Leone for the period of June 2011 to May 2012,* p. 39. The report is available from the website of the RSCSL at http://www.rscsl.org/Documents/AnRpt9.pdf (last visited 11 April 2017).
[26] Ibid., p. 36; Article 7 (2) of the RSCSL Statute.

transfer residual functions to the joint Residual Mechanism after their closure, like the Special Tribunal for Lebanon or other future Tribunals.

VII. Structure and Functions of the Residual Mechanism

The structure, functions and regulatory framework of the Residual Mechanism are defined in Security Council Resolution 1966 (2010) and the Rules of Procedure and Evidence of the Residual Mechanism (IRMCT RPE).[1] Annex 1 of Resolution 1966 (2010) contains the Statute of the International Residual Mechanism for Criminal Tribunals (IRMCT Statute) and the Statutes of the Tribunals as well, as the Residual Mechanism are subject to the Transitional Arrangements set out in Annex 2 to the Resolution.[2]

1. Resolution 1966 (2010)

On 22 December 2010, the Security Council established the Residual Mechanism with two branches through Resolution 1966 (2010). The ICTY branch commenced functioning on 1 July 2013 and the ICTR branch on 1 July 2012.[3] Resolution 1966 (2010) was adopted by a vote of 14 to none, with one abstention by the Russian Federation.[4] The representative of the Russian Federation expressed criticism, pointing out that Resolution 1966 (2010) was required only because the Tribunals were drawing out their activities. In addition, he stressed that according to Resolutions 1503 (2003) and 1534 (2004) the work of the Tribunals needed to end by the deadlines established within the Completion Strategy and that the Tribunals had had every opportunity to do so. He concluded that the Russian Federation firmly believes that Resolution 1966 (2010) is 'the last on the issue of the duration of the Tribunals' activities, and that they will be fully wound up by the end of 2014.'[5] The representatives of the United Kingdom, the United States, Japan, and Austria welcomed the adaption of the resolution. According to the representative from the United Kingdom, the resolution ensures the continuation of the Tribunals' essential legal functions, including the trial of the remaining fugitives 'who need to be brought to justice.'[6] The Austrian representative pointed out that the 'establishment of the Residual Mechanism sends a strong Security Council message against impunity.'[7] Further, the representative of Japan emphasized that the establishment of the Tribunals 'was the manifestation of the full determination of the international community not to tolerate impunity. The Tribunals have contributed significantly to the furtherance of international criminal justice,' and the Residual Mechanism is an 'extremely important organ that will take over essential functions and maintain the legacies of the Tribunals.' But the

[1] UN Security Council Resolution 1966 (2010), UN Doc. S/RES/1966 (2010), 22 December 2010.
[2] Ibid, Annex II.
[3] Ibid., para. 1.
[4] In favour: Austria, Bosnia and Herzegovina, Brazil, China, France, Gabon, Japan, Lebanon, Mexico, Nigeria, Turkey, Uganda, United Kingdom of Great Britain and Northern Ireland, United States of America.
[5] UN Security Council 6463rd meeting, UN Doc. S/PV.6463, 22 December 2010, p. 3.
[6] Ibid.
[7] Ibid., p 4.

representatives of Japan also found that the resolution requires the Tribunals to complete their work expeditiously and to 'prepare their closure and ensure a smooth transition to the Residual Mechanism.'[8]

The objective of the Residual Mechanism is to carry on the jurisdiction, essential functions, rights and obligations of the ICTR and ICTY in accordance with the provisions of the Resolution.[9] In addition, all international agreements and contracts concluded by the UN concerning the Tribunals that are still in force on the Commencement Dates apply to the Residual Mechanism as well, but with appropriate modifications.[10] The Secretary-General was requested to make all practical arrangements in order to ensure the functioning of the Residual Mechanism by the first Commencement Dates, including preparations for the selection of the judges and information security as well as the access system for the Tribunals' archives.[11] The Secretary-General was asked to submit a draft of the Rules of Procedure and Evidence for the Residual Mechanism. The IMRCT RPE needed to be based on the ICTY RPE and the ICTR RPE but in accordance with the provisions of Resolution 1966 (2010). However, the draft of the Rules of Procedure and Evidence needed to be considered, amended, and adopted by the Residual Mechanism's judges unless the Security Council decided otherwise.[12]

The Resolution recalls the obligation of states to cooperate with the Residual Mechanism and the Tribunals, including the obligation concerning assistance to locate, arrest, detain, surrender and transfer accused persons.[13]At the time when Resolution 1966 (2010) was adopted, two remaining fugitives of the ICTY[14] and nine fugitives of the ICTR were at large.[15] If necessary, states are required to take measures according to their domestic law to implement the regulations of Resolution 1966 (2010).[16] In particular, states where fugitives are suspected to be at large are requested to intensify their work with the Tribunals. Further, these states have to provide assistance to the Tribunals and the Residual Mechanism in order to arrest the fugitives expeditiously.[17] The Resolution underlines the importance of referring cases that do not concern the most senior leaders suspected of being most responsible for crimes to national jurisdictions. The referral

[8] Ibid., p. 4.
[9] Ibid, para. 1.
[10] Ibid, para. 4.
[11] Ibid., para 13; Article 32 of the IRMCT Statute. UN Security Council Resolution 1966 (2010), UN Doc. S/RES/1966 (2010), 22 December 2010.
[12] Ibid., paras. 5-6.
[13] Phénéas Munyarugarama, Aloys Ndimbati, Fulgence Kayishema, Ladislas Ntaganzwa, Charles Ryandikayo, Charles Sikubwabo, Félicien Kabuga, Augustin Bizimana and Protais Mpiranya.
[14] Ratko Mladić and Goran Hadžić.
[15] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, Annex I, 17 May 2016, para. 45; *Progress report of the Prosecutor of the International Residual Mechanism for Criminal Tribunals, Serge Brammertz, for the period from 16 November 2015 to 15 May 2016,* UN Doc. UN Doc. S/2016/453, Annex II, 17 May 2016, para. 6.
[16] Ibid., para. 9.
[17] Ibid., para. 10.

should be undertaken in accordance with the Tribunals' and the Residual Mechanism's Statutes and Rules of Procedure and Evidence.[18] In this context, states were asked to cooperate closely with the Tribunals and the Residual Mechanism in order to receive referred cases.[19] But the Tribunals and the Residual Mechanism were also asked to cooperate with the affected countries and interested entities. Information and documentation centres need to be established in order to provide access to copies of public records of the archives.[20] Finally, the Resolution points out that the Residual Mechanism operates for an initial period of four years from the first Commencement Date. After that initial period the progress of the work will be reviewed, and the work may continue for an additional two years. The progress will be reviewed regularly.[21] The Resolution emphasizes once more that the Tribunals have to take all possible measures to expeditiously complete all their remaining work no later than 31 December 2014, as set forth in Resolution 1966 (2010). Further, the Tribunals should prepare for their closure and guarantee a smooth transition of the functions to the Residual Mechanism.[22]

2. Statute of the Residual Mechanism – Annex 1

The Residual Mechanism was established by the Security Council acting under Chapter VII of the UN Charter,[23] with the purpose of carrying out residual functions of the Tribunals.[24] Annex 1 to Resolution 1966 (2010) contains the IRMCT Statute, including the Preamble and 32 Articles. The question appears of whether the Security Council considered the expressed criticism against the slow progress of the Tribunals' work and provided provisions to oblige the Residual Mechanism to be more efficient.

A. Structure and Staffing of the Residual Mechanism

According to Article 3 of the IRMCT Statute, the Residual Mechanism is an institution with two branches. The branch for the ICTY is seated in The Hague, and the branch for the ICTR is seated in Arusha.[25] Arrangements between the UN and the host countries determined the seats of the branches.[26] Each branch has its own Trial Chamber, but the two branches share a common Appeals Chamber.[27] Because the Residual Mechanism is designed as one institution that is divided into two distinct branches, it is obviously cost-

[18] Ibid., para. 11.
[19] Ibid., para. 12.
[20] Ibid., paras. 14-15.
[21] Ibid., para. 17.
[22] Ibid., para. 3.
[23] Ibid; Annex I 'Statute of the International Residual Mechanism for Criminal Tribunals (IRMCT)', preamble.
[24] Article 2 of the IRMCT Statute.
[25] Article 3 of the IRMCT Statute.
[26] UN Security Council Resolution 1966 (2010), see note 11, para. 7.
[27] Article 4 (1) of the IRMCT Statute.

efficient to create a common Appeals Chamber that can conceive of itself as the ICTY or ICTR Appeals Chamber depending upon which Tribunal's jurisdiction it is exercising. The organisation of separate trial capacity and one shared Appeal Chamber according to Article 10 (1) of the ICTR Statute and Article 11 (1) of the ICTY Statute mirrors the already existing link between the ICTR and the ICTY.

The number of Trial Chambers was reduced. While the ICTY and the ICTR have three Trial Chambers each, the Residual Mechanism has only one Trial Chamber for each branch.[28] Further, the Residual Mechanism consists of the Chambers, the Prosecutor, and the Registry, which are equivalent to the three organs of the Tribunals.[29] But the difference from the structure of the Tribunals is the common Prosecutor and Registry for both branches.[30] While the Tribunals always used to have separate Registrars, the Prosecutor was common to both institutions until Resolution 1503 (2003) provided a Prosecutor for each Tribunal.[31] Sharing one Prosecutor and one Registry ensures close cooperation between the two branches of the Residual Mechanism.

a. Election of Judges

The Residual Mechanism's Statute provides some differences from the Tribunals' policy framework regarding staffing. Articles 8-12 of the IRMCT Statue regulate the roster and election of judges. The Residual Mechanism shall have a roster of 25 judges, of whom no more than two may be nationals of the same state, pursuant to Article 8 (1) of the IRMCT Statute. According to Article 8 (4), the roster system of judges works on a per diem basis, so the judges of the Residual Mechanism receive remuneration for each day they exercise their function and not simply for being on the roster. In contrast, the Tribunals' approach was to appoint permanent judges and ad litem judges, according to Article 12 (1) of the ICTY Statute and 11 (1) of the ICTR Statute. These judges were present full-time.[32]

In the case of Milan Lukić, Judge Jean-Claude Antonetti pointed out the problem regarding the remuneration of judges.[33] He explained that the remuneration of judges is not only compensation for the work carried out but also a guarantee to the accused and the victims that the judge is not corrupt, because he is being adequately paid.[34] In the case of the Residual Mechanism, the judge will be remunerated on a one-off basis for the work completed. But according to Judge Antonetti, this provision raises numerous problems

[28] Article 4 (1) of the IRMCT Statute; Article 11 (1) of the ICTY Statute; Article 10 (1) of the ICTR Statue.
[29] Article 4 (1) of the IRMCT Statute; Article 10 (1) of the ICTR Statute; 11 (1) of the ICTY Statute.
[30] Article 4 (b) (c) of the IRMCT Statute.
[31] UN Security Counsil Resolution 1503 (2003), UN Doc. S/RES/1503 (2003), 28 August 2003, para.8.
[32] Articles 12, 13 bis of the ICTY Staute; Articles 11, 12 bis of the ICTR Statute.
[33] *Prosecutor v. Milan Lukić and Sredoje Lukić* (Case No. MICT-13-52-R.1), Dissenting Opinion of Judge Jean-Claude Antonetti, 1 October 2015, p. 8.
[34] Ibid.

because it results in different forms of remuneration within the same bench. The President of the Residual Mechanism receives a monthly salary and his colleagues receive lower compensation while doing the same work.[35] At the same time, this system leads to conflicts between the judges because each judge produces his or her own assessment that the judge sends to the President. For example, one judge might claim a different number of hours worked on a case than the other judge. This leads to judges being differently remunerated in the same case. The President could receive documentation from the judges that could lead him or her to believe either that one judge worked more than the other or that one judge exaggerated in assessing the number of hours worked. Judge Antonetti pointed out that in particular cases, the Prosecutor and judge's assistant would receive a monthly salary and the defence attorney would be compensated for his or her job.[36] However, only the judge would be paid an hourly rate for his work. This could lead to the issue that the judges would only be able to familiarise themselves with a draft decision prepared by the President, and the work of the judges would most likely be rushed. Further, Judge Antonetti critically pointed the fact that the judges of the Residual Mechanism already have other professional activities, because they otherwise would not be able to afford to live from their hourly fee. [37] According to Carcano, the judgements issued by the Residual Mechanism may be poorly reasoned because the judges may contribute less than they could if they were working remotely. Under the leadership of the presiding judge, experienced legal officers that are assigned to a case will draft the judgement with assistance in the form of written suggestions from the other judges. The judges contribute less in shaping the content of those judgments, which may prevent the Residual Mechanism from producing judgments of the highest quality.[38]

Judge Antonetti and Carcano make a valid point, because the decisions of the Residual Mechanism's judges have an impact on future international jurisprudence. An appropriate remuneration for the judges is necessary in order to guarantee the quality of the decisions and to avoid corruption. The remuneration system needs to allow judges to work with full concentration on their cases. But taking into account that the Tribunals' costs have already been under strong criticism, the Security Council needed to reduce the costs of the Residual Mechanism as much as possible when creating the Residual Mechanism. The work of the judges is of crucial importance ensure the proper functioning of the courts.

[35] Ibid., p. 9.
[36] See: *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016*, UN Doc. S/2016/453, 17 May 2016, para. 47.
[37] Ibid., pp. 9-10.
[38] Andrea Carcano, 'Of efficiency and fairness in the administration of international justice: Can the Residual Mechanism provide adequately reasoned judgments?' QIL 40 (2017), p. 36; Giorgia Tortora, 'The Mechanism for International Criminal Tribunals: A Unique Model and Some of Its Distinctive Challenges' ASIL Insight 21 (2017).

The judges may feel disadvantaged, which could have a direct impact on the quality of the decisions. However, the Security Council could solve the problem by returning judges for certain cases to The Hague on a permanent basis. For example, in appeals cases the judge could receive remuneration while in The Hague until the decision has been issued, which would make the so the remuneration system fairer.

Another difference is found in the fact that the Residual Mechanism's roster consists of 25 judges in contrast to the Tribunals' roster of 16 permanent judges supplemented by either nine[39] or twelve[40] ad litem judges. Furthermore, the numbers of judges who may be nationals of the same state were increased from one to two.[41] While the President has to be attendant full time at either seat of the branches of the Residual Mechanism, the remaining judges shall only be present at the seats of the branches at the request of the President. Further, Article 8 (3) enables the President to decide whether the judges may exercise their function remotely, that is away from the seats of the branches of the Residual Mechanism. But it is questionable whether a Chamber would be able to function if the judges were not all in the same location. In the case of Milan Lukić, judge Jean-Claude Antonetti pointed out the problems that may appear if the judges were to exercise their functions remotely, including issues with telephone communication and problems with Internet access. Judge Antonetti argued that it is necessary to conceive deliberations when meeting in person.[42] However, nowadays the Internet provides many ways to communicate, including programs that allow videoconferences. Therefore, it is not necessary for all the judges to be in the same location.

Article 9 (1) of the IRMCT Statute determines the qualification of a judge and outlines that the judge has to be a 'person of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices'. In particular, the experience as a judge of the Tribunals needs to be taken into account. The General Assembly elects the judges of the Residual Mechanism from a list submitted by the Security Council. The list is determined upon receipt of nominees forwarded by states upon the Secretary-General's invitation, according to Article 10 (1) of the IRMCT Statute. The term of appointment of the Residual Mechanism's judges is four years, and the Secretary-General can reappoint the judges after consulting the President of the Security Council and of the General Assembly, pursuant to Article 10 (3) of the IRMCT Statute. [43]

[39] 11 (1) of the ICTR Statute.
[40] 12 (1) of the ICTY Statute.
[41] Article 12 (1) of the ICTY Statute, Article 11 (1) of the ICTR Statute. See also Article (10) (d) of the IRMCT Statute.
[42] *Prosecutor v. Milan Lukić and Sredoje Lukić* (Case No. MICT-13-52-R.1), see note 33, p.10.
[43] Compare 13 bis/13ter with 12 bis/12 ter ICTY Statute and ICTR Statute.

Compared to the assignment of judges and the composition of the chambers at the Tribunals, some development can be found in Article 12 of the IRMCT Statute. First, Article 12 (1) introduces the Single Judge, who deals with all judicial matters that do not concern the trial or referral consideration of a case brought under Article 1 (2) or 1 (3) of the IRMCT Statute. That means the Single Judge will not try cases involving core crimes but rather cases involving contempt and false testimony, because Article 12 (1) refers to Article 1 (4). A Single Judge will conduct proceedings for contempt and false testimony that were previously conducted by the Trials Chamber with three judges at the Tribunals. Another difference is found in Article 12 (3) of the IRMCT Statute, which states that in the event of an appeal against the decision made by the Single Judge, the Appeals Chamber shall be composed of three judges, while the Statutes of the Tribunals provide that the Appeals Chamber has to be composed of five judges for each appeal, pursuant to Article 11 (3) of the ICTR Statute and 12 (3) of the ICTY Statute. This approach is not a reduction of functions. Rather, it ensures the efficiency of the Residual Mechanism and expresses the Security Council's intention to keep the Residual Mechanism a small body.

Compared to the Tribunals' Statutes, the provision regarding the adoption of the IRMCT RPE by the judges of the Residual Mechanism includes three new provisions.[44] However, the Statutes share one common requirement, namely that the IRMCT RPE have to govern 'the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters'.[45] The first new provision found in Article 13 (2) of the IRMCT Statute allows amendments to the IRMCT RPE to be remotely decided by the Residual Mechanism's judges by written procedure. In contrast, Rule 6 (A) of the ICTY RPE requires a plenary meeting of the Tribunals' judges convened with a notice of the proposal addressed to all judges. The amendments to the Rules of Procedure and Evidence can only be adopted if agreed to by not less than ten permanent judges. According to Article 6 (A) of the ICTR RPE, amendments to the IRMCT RPE can be adopted if agreed upon by not less than a majority of all judges. A second development found in Article 13 (3) of the IRMCT Statute provides that 'Rules of Procedure and Evidence and any amendments thereto shall take effect upon adoption by the judges of the IRMCT unless the Security Council decides otherwise.' The Statutes and the Rules of Procedure and Evidence of the Tribunals do not provide the Security Council with such power.[46] Finally, according to Article 13 (4) of the IRMCT Statute, the IRMCT RPE have to be consistent with the IRMCT Statute. This is

[44] Article 13 of the IRMCT Statute.
[45] Compare Article 13 (1) of the IRMCT Statute with Articles 15 of the ICTY Statute and 14 of the ICTR Statutes.
[46] Article 15 of the ICTY Statute and 14 of the ICTR Statute; Rules 1 and 6 (D) of the ICTY RPE and Rules 1 and 6 (C) of the ICTR RPE.

another new condition compared to the provisions in the Statutes and the Rules of Procedure and Evidence of the Tribunals. These amendments prevent the Residual Mechanism from making changes to the IRMCT RPE that could jeopardise the Security Council's aim to reduce the Residual Mechanism's workload. For example, provisions that were specifically amended in order to reduce the workload could not be amended without the consent of the Security Council.

b. President of the Residual Mechanism

The Secretary-General appoints the President of the Residual Mechanism.[47] According to Article 11 (1) of the IRMCT Statute, the Secretary-General appoints a full-time President from among the judges of the Residual Mechanism after consulting the judges of the Residual Mechanism and the President of the Security Council. Similar to the provision of the ICTY Statute, the President of the Residual Mechanism shall act as the Presiding Judge of its Appeals Chamber.[48] In the case of Milan Lukić Judge, Jean-Claude Antonetti pointed out the problems regarding the duties of the President of the Residual Mechanism overlapping with his duties when presiding over a case.[49] Considering the time required for working on a case, the question arises of how the President of the Residual Mechanism, who travels and is involved in representation and colloquia, would be able to work on cases. According to Judge Antonetti, there is a risk that a legal team would end up doing the work for the President instead. Judge Antonetti recommended determining the precise duties of the President by amending Article 11 (2) of the IRMCT Statute and deleting the sentence at the beginning of Article 12 (3) of the IRMCT Statute providing that 'the President of the Residual Mechanism shall be a member of the Appeals Chamber, appoint the other members, and preside over its proceedings.'[50] According to Judge Antonetti, a court would be more independent if a distinction were made between the person who assigns judges and the person who presides over proceedings.[51] Judge Antonetti has a valid point. For example, in the case of a request for the disqualification of a judge appointed by the President, the President himself rules on this request or designates a bench to do so, according to Rule 18 of the IRMCT RPE. Although the President could reconsider his decision regarding the appointment of a judge, it would be more reasonable if the request for the disqualification of a judge were to be reviewed by a third person. This would make the decision more transparent. Judge Antonetti indeed points out the problem, which is a

[47] Article 11(1) of the IRMCT Statute; Artilce14 (1) of the ICTY Statute; Article 13 (1) of the ICTR Statute.
[48] Article 12 (3) of the IRMCT Statute; Article 14 (2) of the ICTY Statute.
[49] *Prosecutor v. Milan Lukić and Sredoje Lukić* (Case No. MICT-13-52-R.1), see note 33, p. 7.
[50] Ibid.
[51] Ibid., p. 8.

result of the Security Council's attempt to keep the Residual Mechanism as small as possible. Hence, the President has to fulfil several tasks simultaneously. The duration of the proceedings would be unnecessarily extended if the duties of the President overlapped with his duties when presiding over a case. This could result in violation of the fair trial rights of the accused. In the case that a legal team would do the work for the President instead, it would more reasonable to appoint another Judge for this task in the first place. The President should only deal with the tasks inherent to his position involving administration and representation.

c. Office of the Prosecutor and Registry

Articles 14 and 15 of the IRMCT Statute regarding the Registry and Prosecutor organs correspond to Articles 15 and 16 of the ICTR Statute and Articles 16 and 17 of the ICTY Statute. The Residual Mechanism consists of a Prosecutor and Registry common to both branches. The Registrar and the Prosecutor have to be present at either seat of the branches when it is necessary to carry out their functions. Furthermore, each organ is additionally staffed by an officer in charge at the seat of each branch of the Residual Mechanism.[52] According to Articles 14 (5) and 15 (4) of the IRMCT Statute, the Offices of the Prosecutor and the Registry retain a small number of staff. This corresponds with the reduced functions of the Residual Mechanism in general. But the Offices also maintain a roster of qualified potential staff that allows the Residual Mechanism to recruit additional staff rapidly when needed to perform its functions.[53] Similar to judicial nominees, persons with experience at the Tribunals shall be preferred.[54] The Secretary-General appoints the staff of the Offices on recommendation of the Registrar or the Prosecutor. Article 16 of the IRMCT Statute provides the Prosecutor with the power to conduct investigations against persons covered by Article 1 of the IRMCT Statute, but prohibits the Prosecutor from preparing new indictments against persons other than those covered by Article 1 of the IRMCT Statute.

An important development was the implementation of the 'one office' approach to integrating the staff and resources of the Office of the Prosecutor of the Residual Mechanism and that of the ICTY.[55] The staff of the Prosecution is available to 'double-hat', so it can work for either the Residual Mechanism or the Tribunals depending on requirements and the case-related knowledge needed. The resources of both Offices are

[52] Articles 14 (3), 15 (2) of the IRMCT Statute.
[53] Articles 14 (5), 15 (4) of the IRMCT Statue.
[54] Articles 14 (3), 15 (2) of the IRMCT Statue.
[55] *Progress report of the Prosecutor of the International Residual Mechanism for Criminal Tribunals, Serge Brammertz, for the period from 16 November 2015 to 15 May 2016' Annex II,* UN Doc. S/2016/453, 17 May 2016, para 41.

deployed where necessary. Further, the Office of the Prosecutor integrated the management teams to provide help in carrying out the responsibilities of the Residual Mechanism and the Tribunals.

B. Jurisdiction

Regarding the exercise of jurisdiction, the provisions of the IRMCT Statute mirror the provisions of the Tribunals' Statutes. Article 1 of the IRMCT Statute governs the jurisdiction of the Residual Mechanism as continuing 'the material, territorial, temporal and personal jurisdiction of the ICTY and the ICTR', as set out in Articles 1 to 8 of the ICTY Statute [56] and Articles 1 to 7 of the ICTR Statute.[57] These provisions cover the core crimes and modes of responsibility applicable to the Tribunals. Hence, Article 1 (1) of the IRMCT Statute provides that each branch is created to carry on the jurisdiction of its parent Tribunal. The jurisdiction continuity between the Residual Mechanism and the Tribunals in particular is essential for the legacy of the ICTY and the ICTR in order to prevent impunity for fugitives after the closure of the Tribunals.[58]

a. Jurisdiction Ratione Personae

Article 1 (2) of the IRMCT Statute restricts the jurisdiction to the prosecution of only 'persons indicted by the ICTY or the ICTR who are among the most senior leaders suspected of being most responsible for the crimes covered by paragraph 1 of this Article, considering the gravity of the crimes charged and the level of responsibility of the accused' (high-level fugitives). This provision is derived from Rule 11bis of the ICTY RPE, which refers to Resolution 1534 (2004) that requests indictments be restricted to the most senior leaders suspected of being most responsible for crimes.[59] These criteria of Article 1 (2) are identical to the Rule 11bis (C) of the ICTY RPE, which defines the requirements that need

[56] Articles 1-8 of the ICTY Statute: Pursuant to Article 1 of the ICTY Statute the Tribunal has jurisdiction over individuals responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991. Articles 2- 5 of the ICTY Statute empower the Tribunal to prosecute persons responsible for grave breaches of the Geneva Convention of 1949, violations of the laws or customs of war, genocide, and crimes against humanity. According to Article 6 the ICTY has jurisdiction over natural persons. Article 7 governs the individual criminal responsibility, including a person who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation, or execution of a crime referred to in Articles 2- 5 of the ICTY Statute. According to Article 8 the territorial jurisdiction of the ICTY extends to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace, and territorial waters.

[57] Articles 1-7 of the ICTR Statute: Pursuant to Article 1 of the ICTR Statute the Tribunal has the competence to prosecute individuals responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring states between 1 January 1994 and 31 December 1994. According to Articles 2- 5 the ICTR has jurisdiction over individuals responsible for genocide, crimes against humanity, and violations of Article 3 common to the Geneva Convention and Additional Protocol II committed on the territory of Rwanda as well as to the territory of neighbouring states. Article 5 provides that the Tribunal has jurisdiction over natural persons and Article 6 governs the individual criminal responsibility, where the Tribunal has the competence to conduct individuals who planned, instigated, ordered, committed, or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2- 4 of the ICTR Statute.

[58] Secretary-General's *Report on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals*, UN Doc. S/2009/258, 21 May 2009; *Statement by the President of the Security Council,* UN Doc. S/PRST/2008/47,19 December 2008, para. 99.

[59] UN Security Council Resolution 1534 (2004), UN Doc. S/RES/1534 (2004) of 26 March 2004.

to be considered by a Chamber when determining whether to refer a case for trial from the Tribunals to domestic courts. Article 1 (3) of the IRMCT Statute only allows for the prosecution of those persons indicted by the Tribunals that do not belong to the most senior leaders (lower-level fugitives) after it has made all reasonable efforts to refer the case to national jurisdiction for prosecution under Article 6 of the IRMCT Statute. Hence, the gravity of the alleged crimes and the level of responsibility of the accused determine whether the accused falls within the jurisdiction of the Residual Mechanism. The regulation that requires the Residual Mechanism to focus on high-level fugitives is now a statutory provision. This shows the Security Council's intention to reduce the Residual Mechanism's work as much as possible. Establishing Rule 11bis of the ICTY RPE was an important part of the Tribunals' Completion Strategy. The Security Council addressed the criticism expressed against the establishment of the Residual Mechanism by putting an important regulation of the Completion Strategy into the IRCMT Statute.

Among the IWGIT members there was a principle agreement throughout the negotiations that there should be no impunity for the fugitives from the two Tribunals. But when the IWIGIT negotiated Resolution 1966 (2010), some discussion arose as to whether all or only specific fugitives should fall within the jurisdiction of the Residual Mechanism.[60] The Security Council's President reaffirmed the need to bring persons indicted by the ICTY and ICTR to justice.[61] But it was clear that the workload of the Residual Mechanism would be reduced if the Residual Mechanism did not try all remaining fugitives. According to the Secretary-General's report, the 'illustrative examples demonstrate that the level of staffing, and therefore the staffing costs, do not vary greatly as a result of the number of functions transferred to the Residual Mechanism, but are affected much more significantly by whether there is a trial on-going or not.' [62]

Different approaches were discussed. Some members believed that the jurisdiction of the Residual Mechanism should only extend to high-level fugitives.[63] This approach would have resulted in the so-called '3 plus 2' formula, which means the Residual Mechanism's jurisdiction would have been extended to the three high-level fugitives of the ICTR and to the two ICTY fugitives remaining at that time.[64] The remaining fugitives of the ICTR do not fall within the jurisdiction of the Residual Mechanism and have to be tried by domestic courts. But other members of the IWGIT did not agree with this approach, because they took the view that the Security Council would be sanctioning impunity if the

[60] The IWIGIT worked confidentially and not in public. Secretary-General's Report, see note 58, para. 14.
[61] *Statement by the President of the Security Council,* UN Doc. S/PRST/2008/47, 19 December 2008.
[62] Ibid., para. 243.
[63] UN Security Council Resolution 1503 (2003), see note 31; UN Security Council Resolution 1534 (2004), see note 59.
[64] Brigitte Benoit Landale and Huw Llewellyn, 'The International Residual Mechanism for Criminal Tribunals: The Beginning of the End for the ICTY and ICTR' Int'l Org. L. Rev 8 (2011) 349, 355.

Statute of the Residual Mechanism did not deal with the lower-level fugitives of the ICTY and the ICTR. These members preferred the option where the Residual Mechanism has the same jurisdiction over high-level as well as lower-level fugitives as the Tribunals.[65] The eventual compromise was found where the Residual Mechanism has jurisdiction over all fugitives but deals differently with the high-level and the lower-level fugitives. Article 1 of the IRMCT Statute distinguishes between the Residual Mechanism's competences over high-level fugitives on the one hand and the lower-level fugitives on the other hand. Regarding lower-level fugitives, the Residual Mechanism has the power to prosecute only after it has exhausted all reasonable efforts to refer those cases to domestic authorities.[66] Consequently, Article 1 of the IRMCT Statute changes the approach from giving the Tribunals the authority to refer lower-level cases to requesting that the Residual Mechanism exhaust all reasonable efforts to refer cases to national authorities. In order to assist the Residual Mechanism in this regard Resolution 1966 (2010) requests all states to cooperate as much as possible to be able to receive cases from the Residual Mechanism and the Tribunals.[67] This approach is appropriate to reduce the workload of the Residual Mechanism, which is necessary in order to be able to keep the Residual Mechanism a small body. In the cases of the lower-level fugitives it does not result in impunity, because the national courts still have the jurisdiction to rule on those fugitives.

b. Lack of Competence to Issue New Indictments

Both Tribunals issued new indictments and indictments regarding cases of contempt and false testimony.[68] Article 1 (5) of the IRMCT Statute ensures that the Residual Mechanism is not able to extend its jurisdictional competence. The Residual Mechanism does not have the competence to issue any new indictments against persons other than those covered by Article 1 of the IRMCT Statute. Indictments concerning the high-level fugitives have already been issued. Hence, the Residual Mechanism has only the power to bring new indictments regarding cases of contempt and false testimony, pursuant to Article 1 (4) of the IRMCT Statute.[69] The provision ensures that the work of the ad hoc Tribunals continued by the Residual Mechanism will definitely be finished one day. This is due to

[65] Ibid.
[66] Article 1 (3) of the IRMCT Statute.
[67] Brigitte Benoit Landale and Huw Llewellyn, 'The International Residual Mechanism for Criminal Tribunals: The Beginning of the End for the ICTY and ICTR' Int'l Org. L. Rev 8 (2011) 349, 355- 357.
[68] For example: *Prosecutor v. Vojislav Šešelj* (Case No. IT-03-67-R77.2-A), Judgment, 19 May 2010; *Prosecutor v. Shefqet Kabashi* (Case No. IT-04-84-R77.1), Judgment, 16 September 2011; *Prosecutor v. Zuhdija Tabaković* (Case No. IT-98-32/1-R77.1), Sentencing Judgment, 18 March 2010; *Prosecutor v. GAA* (Case No. ICTR-07-90-R77-I), Judgment and Sentence, 4 December 2007.
[69] Article 1 (4) of the IRMCT Statute; Brigitte Benoit Landale and Huw Llewellyn, 'The International Residual Mechanism for Criminal Tribunals: The Beginning of the End for the ICTY and ICTR' Int'l Org. L. Rev. 8 (2011) 349, 355-357; Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 932.

the criticisms of the member states during the adaption of Resolution 1966 (2010) regarding the slow progress of the Tribunals' work. The Security Council wanted to avoid mistakes made by the Tribunals when creating the Residual Mechanism. In addition, the trial function of the Residual Mechanism was intended to be 'residual'. This means the Residual Mechanism's task is to complete the work of the Tribunals, and not to commence new investigations or prosecutions. But amendments to indictments are possible. This would apply in the case when a judge wants to update the indictment because of factual or legal findings in other cases.

According to Article 17 of the IRMCT Statute, the Residual Mechanism's duty or Single Judge has competence to review indictments. Article 17 of the IRMCT Statute mirrors Article 19 of the ICTY Statute and Article 18 of the ICTR Statute. According to Article 17 (1), the duty or the Single Judge reviews the indictment, and in the case the judge determines that a prima facie case was not established, the judge has to dismiss the indictment. Further, Article 17 (1) regulates that 'upon confirmation of an indictment, the judge may, at the request of the Prosecutor, issue such orders and warrants for the arrest, detention, surrender or transfer of persons, and any other orders as may be required for the conduct of the trial'.[70]

c. Concurrent Jurisdiction with National Courts

According to Article 5 (1) of the IRMCT Statute, the Residual Mechanism has concurrent jurisdiction with national courts concerning cases regarding persons covered by Article 1 of the IRMCT Statute. However, the Residual Mechanism has primacy over those courts.[71] This provision is similar to Article 9 of the ICTY Statute and Article 8 of the ICTR Statute. The difference is that the Residual Mechanism only has the competence to request national courts to defer cases of high-level fugitives. That restriction does not exist in the Tribunals' Statutes. Furthermore, under Article 5 (2) of the IRMCT Statute the Residual Mechanism has the power to request national courts to defer the cases of high-level fugitives at any stage of the procedure though in that case the Residual Mechanism does not act as an independent level of appellate review for the national proceedings. Moreover, the Residual Mechanism has to determine whether the conditions for a fair trial in the domestic jurisdiction no longer exist.[72]

[70] Article 17 (2) of the IRMCT Statute.
[71] Art 5 (2) of the IRMCT Statute.
[72] *Prosecutor v. Jean Uwinkindi* (Case No. ICTR-2001-75-R11bis), Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 28 June 2011, para. 12.

d. Referring Cases to National Jurisdictions

Article 6 of the IRMCT Statute enables the Residual Mechanism to refer cases to national jurisdictions involving lower-level fugitives. The referral process of the Residual Mechanism is described in Article 6 (2)-(6) of the IRMCT Statute. Article 6 is derived from the Tribunals' Rules of Procedure and Evidence and Resolution 1503 (2003). Also, the Tribunals' case law regarding referrals helped to shape Article 6 of the IRMCT Statute.[73] The Tribunals' referral procedure derives from a rule adopted by the judges under Article 14 of the ICTR Statute and Article 15 of the ICTY Statute. These provisions provide the judges of the Tribunal with the privilege of adopting Rules of Procedure and Evidence 'for the conduct of the pretrial phase of the proceedings, trials, and appeals, the admission of evidence, the protection of witnesses and other appropriate matters.' The statutory authority for this rule in the Tribunals' Rules of Procedure and Evidence is based on Resolution 1534 (2004), which introduced the 'Completion Strategy', including the possibility of transferring lower-level accused persons to national jurisdictions as an indispensable element. [74] The judges of the Tribunals, exercising their discretion, adopted the provision regarding referral.

Article 6 mirrors Rule 11bis (A) of the ICTY RPE and Rule 11bis (A) of the ICTR RPE but includes minor variations. However, the main differences between the provisions particularly lies in the fact that the Residual Mechanism is required to undertake every effort to refer those cases to national jurisdictions that do not involve high-level fugitives. According to Article 6 (2) of the IRMCT Statute, the President may create a Trial Chamber that determines whether the case should be referred to the national jurisdiction after an indictment was confirmed and prior to the commencement of trial.[75] In contrast, Rule 11bis of the ICTY RPE creates a discretionary referral. Hence, the Security Council amended the provision to the status of a mandatory statutory provision for the Residual Mechanism. This is an indication of the Security Council´s vision that referrals should be an important part in the functioning of the Residual Mechanism. [76] This approach demonstrates the Security Council's objective to oblige the Residual Mechanism to refer cases when

[73] *Prosecutor v. Gojko Janković* (Case No. IT-96-23/2-AR11bis.2), Decision on Rule 11 bis Referral, 15 November 2005, paras. 1-3, 45-94; *Prosecutor v. Paško Ljubičić* (Case No: IT-00-41-PT), Decision to Refer the Case to Bosnia and Herzegovina pursuant to Rule 11 bis, 12 April 2006, paras. 2-3, 37-48; *Prosecutor v. Mitar Rašević and Savo Todović* (Case No. It-97-25/1-PT), Decision on Referral of Casue Under Rule 11bis, 8 July 2005, paras. 2-3, 72, 107-111; *Prosecutor v. Željko Mejakić, Momčilo Gruban, Dušan Fuštar, Duško Knežević* (Case No. Case No. IT-02-65-PT), Decision on Prosecutor's Motion for Referral of Case Pursuant to Rule 11 bis, 30 July 2005, paras. 36, 64-117; *Prosecutor v. Radovan Stanković* (Case No. IT-96-23/2-PT), Decision on Referral of Case Under Rule 11 bis, 17 May 2005, paras. 18-19; *Prosecutor v. Fulgence Kayishema (*Case No. ICTR-01-67-R11bis), Decision on Prosecutor's Request for Referral to The Republic of Rwanda, 22 February 2012, para. 1; *Prosecutor v. Michel Bagaragaza* (Case No. ICTR-05-86-AR11bis), Decision on Rule 11 bis Appeal, 30 August 2006, para. 8.

[74] Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 938.

[75] Rule 11 bis (A) of the ICTY RPE refers to the Trial Chamber as Referral Bench; *Prosecutor v. Jovica Stanišić and Franko Simatović* (Case No. MICT-15-96-PT), Decision on Simatović Preliminary Motion and Stanišić Motion For Partial Stay,18 April 2016, para. 14.

[76] Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 937.

requirements are met. The decision to impose a mandatory obligation on the Residual Mechanism ensures that the Residual Mechanism's work is as limited as possible.

Article 6 (3) of the IRMCT Statute is derived from Rule 11bis (C) of the ICTY RPE and determines when the definition 'most senior leader' is applicable to a person. Article 6 (3) as well as Rule 11bis (C) of the ICTY RPE refer to Resolution 1534 (2004) and provide that the Trial Chamber considers consistent with Security Council Resolution 1534 (2004), 'the gravity of the crimes charged and the level of responsibility of the accused' when determining whether to refer a specific case. The case may be referred to the authorities of a state in which the accused was arrested, in whose territory the crime was committed, or to the authorities of a state having jurisdiction and being willing and properly prepared to conduct the proceedings.[77] When determining whether to refer a case Rule 11bis (C) of the ICTR RPE provides that a Trial Chamber has to satisfy itself that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. This provision is found in Rule 11bis (B) of the ICTY RPE and in Article 6 (4) of the IRMCT Statute. Pursuant to Article 6 (4) of the IRMCT Statute, the Trial Chamber can order a referral at its own discretion or at the request of the Prosecutor. But before this, the Trial Chamber has to allow the Prosecutor and the accused to be heard. After being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out, the referral is permitted.

Another new approach is the abandonment of discretionary monitoring of cases referred to national authorities in favour of a mandatory monitoring in Article 6 (5) of the IRMCT Statute, which relies upon the assistance of international and regional organisations and bodies. Regarding the question of monitoring Rule 11bis (D) (iv) of the ICTY RPE and Rule 11bis (D) (iv) of the ICTR RPE provide that the Prosecution 'may send observers to monitor the proceedings'. In addition, two more variations exist. First, according to Rule 11bis, the Prosecutor is responsible for monitoring cases, whereas under Article 6 (5) of the IRMCT Statute the Trial Chambers has this obligation. The Residual Mechanism monitored three cases referred to Rwanda through monitors from the Kenyan Section of the International Commission of Jurists.[78] In the cases of Jean Uwinkindi and Bernard Munyagishari, the question appeared as to which organ of the Residual Mechanism has the competence to clarify or grant relief regarding monitoring modalities for cases referred for trial by the ICTR.[79] According to Article 1 (1) of the IRMCT Statute,

[77] Article 6 (2) (i)-(iii) of the IRMCT Statute.
[78] *Fourth annual report of the International Residual Mechanism for Criminal Tribunals*, UN Doc. A/71/262–S/2016/669, 1 August 2016, para. 82.
[79] *Prosecutor v. Jean Uwinkindi* (Case No. ICTR-2001-75-R11bis), see note 72, para. 12; *Prosecutor v. Bernard Munyagishari* (Case No. ICTR-2005-89-R11bis), see note 98.

the Residual Mechanism continues the material, territorial, temporal, and personal jurisdiction of the Tribunals as well as the rights and obligations. Article 6 (5) of the IRMCT Statute further provides that the Residual Mechanism monitors cases referred to national courts by the Tribunals with the assistance of international and regional organisations and bodies. But neither the IRMCT Statute nor the IRMCT RPE explicitly provides an answer to the question of which organ of the Residual Mechanism possesses the authority to clarify or grant relief concerning the monitoring modalities in place for cases referred for trial by the Tribunals. However, the Referral and Appeals Chamber in the case of Jean Uwinkindi and the Referral Chamber in the case of Bernard Munyagishari have recognised the authority of the ICTR President to resolve problems regarding the implementation and operation of the monitoring Residual Mechanism. The President may direct the ICTR Registrar to make arrangements regarding the monitoring of the referred cases.[80] According to Article 31 (A) of the IRMCT RPE, the President has the power to direct the Registrar concerning the administration and servicing of the Residual Mechanism. The Residual Mechanism takes on the rights and obligations of the Tribunals.[81] Therefore, it falls within the authority of the Residual Mechanism's President to exercise the same authority regarding the implementation and operation of the monitoring Residual Mechanism previously exercised by the ICTR President.[82] Further, in 2013 the Residual Mechanism defined the expectations for trial monitors. The trial monitors need to present only 'objective information' on possible violations of the right to a fair trial and 'refrain from including in their reports any opinion, assessment, or conclusions regarding such violations or impediments unless otherwise directed.'[83] Hence, the Chamber determines whether the accused receives a fair trial and whether a revocation of the referral is required.

According to Article 6 (6) of the IRMCT Statute, the Residual Mechanism's Trial Chamber may revoke the order at the request of the Prosecutor or proprio motu but only under the premise that the state authorities had the opportunity to be heard. According to Rule 11bis (F) of the ICTY RPE, after state authorities have had the opportunity to be heard the Prosecutor can make a request to revoke an order. Afterwards, the Trial Chamber renders its decision on the request, according to Rule 11 bis (F) of the ICTY and ICTR

[80] Ibid., p. 59; *Prosecutor v. Jean Uwinkindi* (Case No. ICTR-2001-75-R11bis), Decision on Uwinkindi's Appeal Against the Referral of his Case to Rwanda and Related Motions Case, 16 December 2011, para. 84; *Prosecutor v. Jean Uwinkindi* (Case No. ICTR-2001-75-R11bis), Decision on Uwinkindi's Motion for Review or Reconsideration of the Decision on Referral to Rwanda and the Related Prosecution Motion, 23 February 2012, para. 16; *Prosecutor v. Bernard Munyagishari* (Case No. ICTR-2005-89-R11bis), Decision on the Prosecutor's Request for Referral of the Case to the Republic of Rwanda, 6 June 2012, para. 55.
[81] *Phénéas Munyarugarama v. Prosecutor* (Case No. MICT-12-09-AR14), Decision on Appeal Against the Referral of Phénéas Munyarugarama's Case to Rwanda and Prosecution Motion to Strike, October 2012, paras. 5-6.
[82] *Prosecutor v. Jean Uwinkindi and Bernard Munyagishari* (Case No. MICT-12-25, MICT-12-20), Decision on Registrar's Submission Regarding the Monitoring Residual Mechanism in the Uwinkindi and Munyagishari Cases, 15 November 2013, para. 14.
[83] Ibid., para. 29.

RPE. In contrast, Rule 11 bis (F) of the ICTR RPE also provides that the Tribunal may revoke the order proprio motu. The order of the Tribunals or the Residual Mechanism can be revoked and a deferral can be requested where it is clear that the conditions for referral of the case are no longer met and it is in the interests of justice. However, this is only possible before the accused has been found guilty or acquitted by a national court. In the case of Pheneas Munyarugarama, the Appeals Chamber of the Residual Mechanism stated that it would adopt the Tribunals' standards when reviewing a request to revoke.[84] The Appeals Chamber of the Residual Mechanism would only intervene if the decisions were based on a discernible error.[85] Hence, the judges of the Residual Mechanism attempt to continue their jurisdiction in accordance with the Tribunals' jurisprudence. This is necessary to ensure the continuity between the Tribunals and the Residual Mechanism. Otherwise, all accused persons in the referred cases would attempt to request a revocation of the referral in their cases. That would result in a massive workload for the Residual Mechanism, jeopardizing the Security Council's intention to reduce the work of the Residual Mechanism as much as possible.

C. Functions of the Residual Mechanism

According to Article 2 of the IRMCT Statute, the purpose of the Residual Mechanism is to carry on the residual functions of the Tribunals.

a. Tracking and Prosecution of the Remaining Fugitives

When developing the Completion Strategy, the Security Council was faced with the problem of how to handle the cases of the remaining fugitives after the closure of the Tribunals. On the one hand, there was a need for justice and the Tribunals' goal to achieve the mandate of ending impunity for the most serious breaches of international law. But on the other hand, the Tribunals faced a huge financial burden. The important decision in this matter was whether the fugitives ought to be tried by a body of an international character or instead be referred to domestic courts. When Resolution 1966 (2010) was adopted, two remaining fugitives of the ICTY and nine remaining fugitives of the ICTR were still at large.

The purpose of creating an institution like the Residual Mechanism was to guarantee that the Tribunals' closure would not result in impunity for those persons who

[84] *Phénéas Munyarugarama v. Prosecutor* (Case No. MICT-12-09-AR14), see note 81, para. 19.
[85] In order to show that such error appeared the appellant has to demonstrate that the Trial Chamber: 'misdirected itself either as to the legal principle to be applied or as to the law which is relevant to the exercise of its discretion; gave weight to irrelevant considerations; failed to give sufficient weight to relevant considerations; made an error as to the facts upon which it has exercised its discretion; or reached a decision that was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the trial chamber must have failed to exercise its discretion properly'.

were responsible for serious violations of international humanitarian law.[86] Otherwise, the reasoning of the Security Council for creating the ICTY and ICTR would have been in vain. This was consistently confirmed by the Security Council and by its state members at the IWGIT when negotiating Resolution 1966 (2010).[87] On 1 August 2012, the Prosecutor of the ICTR transferred the files regarding the remaining high-level fugitives of the ICTR to the Prosecutor of the Residual Mechanism.[88] The cases of the other six remaining fugitives were referred to national authorities in accordance with Rule 11bis of the ICTR RPE. On 9 December 2015 Ladislas Ntaganzwa, one of the nine remaining fugitives indicted by the ICTR, was apprehended and subsequently transferred to Rwanda for trial.[89]

Article 18 of the IRMCT Statute regarding the commencement and conduct of trial proceedings is similar to Article 19 of the ICTR Statue and Article 20 of the ICTY Statute. These provisions regulate the rights of the accused to a 'fair and expeditious trial and that proceedings are conducted in accordance with the Rules of Procedure and Evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses'.[90] But changes regarding the function of the Single Judge can be found in Articles 18 (1), (3), and (4) of the IRMCT Statute. According to these provisions, the Single Judge is allowed to take over functions that were exclusively reserved for the Trial Chamber in the ICTY Statute and ICTR Statute.[91] Besides the functions governed by Article 18 (3) of the IRMCT Statute, the Single Judge or a judge of the Trial Chamber reads the indictment, ensures that the rights of the accused have been respected, confirms that the accused understands the indictment, and instructs the accused to enter a plea. After this, the date for trial has to be set.[92] Article 18 (4) governs the fundamental procedural principle of transparency. The hearings have to be in public with the exception that the Single Judge or Trial Chamber can decide to close the proceedings in accordance with the IRMCT RPE, for example, because of witness protection.

Regarding the ICTY, there are no outstanding fugitives charged with serious violations of international humanitarian law, since Ratko Mladić and Goran Hadžić were

[86] UN Security Council Resolution1966 (2010), see note 11, preamble.
[87] Catherine Denis, 'Critical Overview of Residual Functions' of the Residual Mechanisms and its Date of Commencement (including Transitional Arrangements)' JICJ 9 (2011) 819, 822; *Statement by the President of the Security Council,* UN Doc. S/PRST/2008/47, 19 December 2008; *Statements at the Security Council Meeting,* UN Doc. S/PV6342, 18 June 2010, para. 17- 26; *Statements at the Security Council Meeting,* UN Doc. S/PV6463, 22 December 2010, para. 4; Secretary-General's Report, see note 58, paras. 14-15, 74; Valerie Oosterveld, 'The International Criminal Court and The Closure of the Time-limited International and Hybrid Criminal Tribunals' Loy. U. Chi. Int'l L. Rev. 8 (2010) 13, 15.
[88] *Report on the completion of the mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015*, UN Doc. S/2015/884, 17 November 2015, para. 28.
[89] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, para. 46.
[90] Article 18 (1) of the IRMCT Statute.
[91] Articles 19 (1), (3) and (4) of the ICTR Statute; Article 20 (1), (3) and (4) of the ICTY Statute.
[92] Article 18 (3) of the IRMCT Statute.

arrested in 2011.[93] All trials will be completed by the ICTY. But when Resolution 1966 (2010) was adopted, the last two remaining fugitives were still at large, while Mladić is one of the most prominent alleged war criminals of the whole conflict in former Yugoslavia. The trial of fugitives is a residual function of great importance and is determined in the preamble of Resolution 1966 (2010). This residual function includes the combat of impunity and 'the necessity that all persons indicted by the ICTY and ICTR are brought to justice'.[94] Furthermore, Resolution 1966 (2010) reaffirms the need to establish an ad hoc Residual Mechanism to carry out a number of essential functions of the ICTY and ICTR, including the trial of high-level fugitives.[95] This residual function could persist for decades depending on the lifespan of the remaining fugitives and the time they remain at large.

b. Retrials

The Appeals Chamber of the Residual Mechanism will order retrials if a new fact is discovered that was unknown to the party it concerns during the proceedings.[96] The Residual Mechanism took over as of the date of the commencement of the relevant branch.[97] At the Tribunals, retrials were quite rare. On 29 August 2008, for the first time in either Tribunal, the Appeals Chamber ordered the retrial of a person accused by the ICTR in the case of Tharcisse Muvunyi.[98] Further, a partial retrial was ordered in the ICTY case of Haradinaj et al. on 21 July 2010.[99] On 9 December 2015, the Appeals Chamber of the ICTY issued a judgment in the case of Jovica Stanišić and Franko Simatović, quashing their acquittals and ordering a retrial on all counts.[100] Currently, a Trial Chamber of the Residual Mechanism at The Hague branch is seized of the case.[101]

c. Appellate Proceedings

Regarding the rights of appeal, Article 23 of the IRMCT Statute mirrors Article 24 of the ICTR Statute and Article 25 of the ICTY Statute and defines the cases where appeals from

[93] *Assessment and report of Judge Carmel Agius, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) covering the period from 17 November 2015 to 17 May 2016,* UN Doc. S/2016/454, 17 May 2016, para. 5.
[94] UN Security Council Resolution1966 (2010), see note 11, preamble.
[95] Ibid., para. 6.
[96] Catherine Denis, 'Critical Overview of Residual Functions' of the Residual Mechanisms and its Date of Commencement (including Transitional Arrangements)' JICJ 9 (2011) 819, 824.
[97] Article 1 (2) of the Transitional Arrangements.
[98] *Prosecutor v. Tharcisse Muvunyi (*Case No. ICTR-2000-55A-A), Judgement, 1 April 2011.
[99] Ibid.
[100] *Prosecutor v. Jovica Stanišić and Franko Simatović* (Case No. IT-03-69-A), Judgement, 9 December 2015, para. 131; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016*, UN Doc. S/2016/453, 17 May 2016, paras. 30, 11.
[101] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, paras. 30, 9; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2016,* UN Doc. S/2016/975, 17 November 2016, para. 34.

convicted persons or from the Prosecutor have to be heard by the Appeals Chamber. An appeal has to be heard when an error or question of law invalidates a decision. In addition, an appeal has to be heard if an error of fact has occasioned a miscarriage of justice.[102] Similar to Article 25 (2) of the ICTY Statute and Article 24 (2) of the ICTR Statute, Article 23 (2) of the IRMCT Statute empowers the Trial Chamber to affirm, reverse, or revise the decisions taken by the Single Judge or the Trial Chamber. The only difference is that Article 23 (2) of the IRMCT Statute also applies this competence to decisions taken by the Single Judge.

On 5 October 2012, the Appeals Chamber of the Residual Mechanism delivered its first decision regarding a challenge brought against a decision of the Trial Chamber of the ICTR. The Trial Chamber transferred the case of Phénéas Munyarugarama for trial proceedings to Rwanda pursuant to Rule 11bis of the ICTR RPE. [103] The Appeals Chamber upheld the decision of the ICTR, finding that the counsel of Phénéas Munyarugarama failed to disprove the assumption that the judiciary of Rwanda is impartial.[104] In reaching its decision, the Appeals Chamber determined that the Residual Mechanism is bound to interpret its Statute and the IMRCT RPE in a manner consistent with the jurisprudence of the Tribunals. Because the Residual Mechanism's mandate is to continue the jurisdiction, obligations, rights, and essential functions of the Tribunals, the IRMCT Statute and the IRMCT RPE reflect normative continuity with the Tribunal´s Statute and Rules of Procedure and Evidence. According to the Appeals Chambers decision, '[t]hese parallels are not simply a matter of convenience or efficiency but serve to uphold principles of due process and fundamental fairness, which are the cornerstones of international justice.'[105]

On 18 December 2014, the Appeals Chamber issued the first and so far only appeal judgement in the case of Augustin Ngirabatware.[106] The Appeals Chamber unanimously affirmed Ngirabatware's conviction for direct and public incitement to commit genocide. But it held that the Trial Chamber erred in convicting Ngirabatware for rape as a crime against humanity pursuing to the extended form of Joint Criminal Enterprise. Therefore, the Appeals Chamber reduced Ngirabatware's sentence of 35 years of imprisonment to 30 years of imprisonment.[107] Regarding the ICTR branch of the Residual Mechanism, the Appeals Chamber will conduct any appeals that may arise in the cases of the outstanding fugitives.

[102] Article 23 (1) (a), (b) of the IRMCT Statute; Article 25 (1) (a), (b) of the ICTY Statute; Article 24 (1) (a), (b) of the ICTR Statute.
[103] *Phénéas Munyarugarama v. Prosecutor* (Case No. MICT-12-09-ARI4), see note 81.
[104] Ibid., para. 24.
[105] Ibid., paras. 4-6.
[106] *Augustin Ngirabatware v Prosecutor* (Case No. MICT-12-29-A), Appeals Judgement, 18. December 2014.
[107] Ibid., para. 278.

On 24 March 2016, the Trial Chamber of the ICTY issued its judgment in the case of Radovan Karadžić, finding him guilty of genocide, crimes against humanity, and violations of the laws or customs of war and sentencing him to 40 years of imprisonment.[108] Further, on 31 March 2016, the Trial Chamber of the ICTY issued its judgment in the case of Vojislav Šešelj, finding him not guilty on all counts. But on 2 May 2016, the Prosecution filed its notice of appeal with the argument that the Trial Chamber erred in law by failing to deliver a reasoned judgment and that it erred in fact by acquitting Vojislav Šešelj.[109] Therefore, the Prosecution requested that the Appeals Chamber revise the trial judgment.[110] The translation of the trial judgment together with the related judicial opinions is expected by the end of September 2016, sooner than originally envisaged, which may have a positive impact on the initial projections for completion of the appeal.[111] Regarding the ICTR branch, Jean Uwinkindi appealed against the decision of the Residual Mechanism's Trial Chamber dismissing his request for revocation of the referral of his case to Rwanda on 20 November 2015.[112] In March 2016, the briefing concerning the substance of his appeal was completed. However, Jean Uwinkindi filed several requests for admission of additional evidence regarding the pending briefing. According to the report, it is estimated that this matter will be concluded during the next reporting period.[113]

d. Review Proceedings

Article 24 of the IRMCT Statute regulates review proceedings and mirrors Article 25 of the ICTR Statute and Article 26 of the ICTY Statute. Article 24 provides following:

'Where a new fact has been discovered which was not known at the time of the proceedings before the Single Judge, Trial Chamber, or Appeals Chamber of the ICTY, the ICTR, or the Residual Mechanism and which could have been a decisive factor in reaching the decision, the convicted person may submit to the Residual Mechanism an application for review of the judgement.'

Besides the fact that this provision now also includes proceedings before a Single Judge, Article 24 of the IRMCT Statute outlines further development regarding the review proceedings that are not found in the Statutes of the Tribunals. The first development is that the Prosecutor is allowed to submit an application for review of the judgement within one year from the day when the final judgement was pronounced. The second development

[108] *Prosecutor v. Radovan Karadžić* (Case No. IT-95-5/18-T), Judgment, 24 March 2016; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, para. 31.
[109] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, para. 31.
[110] Ibid., para. 32.
[111] Ibid.
[112] Ibid., para. 33.
[113] Ibid.

is that the Chamber only reviews the judgement after the majority of judges approve in a preliminary examination that the new fact could have been a decisive factor in reaching the decision, according to Article 24 of the IRMCT Statute. These two provisions are based upon Rules 119 of the ICTY RPE and 120 of the ICTR RPE. According to 119 (A) of the ICTY RPE, the Prosecutor can make a motion to the Chamber for review of the judgement, if a 'new fact has been discovered which was not known to the moving party at the time of the proceedings before a Trial Chamber or the Appeals Chamber, and could not have been discovered through the exercise of due diligence, the defence or, within one year after the final judgement has been pronounced.' It is noticeable that Article 24 of the IRMCT Statute is very similar to Article 84 of the Rome Statute. The Security Council intends to ensure the integrity of the court on the one hand but also to guarantee the rights of the accused on the other hand.

Article 24 of the IRMCT Statute differs from the Tribunals' provisions in the aspect that Article 24 does not require the review to be carried out by the same bench that dealt with the case in the first instance.[114] This requirement would be practically impossible for the cases where the Residual Mechanism has to review judgements of the Tribunals. In such cases, it is impossible for the same bench to carry out the review, because the bench of the Tribunal no longer exists. The Appeals Chamber of the Residual Mechanism was faced with decisions or orders on six applications for review or related requests for assignment of counsel.[115] Further, it is currently seized of an additional application for review arising out of an Arusha branch case.[116] The President has presided over each case and prepared the case for deliberations. At the same time, non-double-hatted judges have worked remotely.[117]

e. Jurisdiction over Contempt Cases

A new statutory development is found in Article 1 (4) (a) and (b) of the IRMCT Statute, which provides the Residual Mechanism with the competence to prosecute crimes of contempt and false testimony. Article 1 (4) covers any person who knowingly and wilfully interferes or has interfered with the administration of justice of the Residual Mechanism or the Tribunals. In the case of the ad hoc Tribunals, the prosecution of such cases was governed by the Rules of Procedure and Evidence rather than by the Statutes, which are silent on the subject.[118] The wording of Article 1 (4) mirrors Rules 77 of the ICTY RPE

[114] Rule 119 (A) of the ICTY RPE; Rule 120 (A) of the ICTR RPE.
[115] Four for Arusha branch and two for The Hague branch; *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 18.
[116] Ibid.
[117] Ibid.
[118] Article 77 of the ICTY RPE, Article 77 of the ICTR RPE.

and 91 of the ICTR RPE regarding contempt of the Tribunals and false testimony. While the Statutes of the Tribunals did not provide such competence, the judges decided to incorporate this power when adopting the Rules of Procedure and Evidence. According to the Secretary-General's report, this function determines an ad hoc function which occurs, for example, 'where a witness before a Chamber wilfully refuses to answer a question or a person threatens, intimidates, offers a bribe to, or otherwise interferes with a witness who is giving, has given, or is about to give evidence before the Tribunal.'[119] An effective guarantee of justice requires a judicial capacity to sanction any violation of the Tribunals' orders. One important part of contempt cases consists of proceedings regarding the punishment of wilful disclosure of the identity of protected witnesses. This function was considered an essential function of the Tribunals that needs to be continued in order to guarantee the protection of victims and witnesses and at the same time to ensure the integrity of the proceedings of both Tribunals.[120] Therefore, although the exercise of jurisdiction concerning those offences is not laid out in the Statutes of the Tribunals, it is a crucial right of a court to protect the integrity of its own proceedings. Hence, this provision is also necessary for the Residual Mechanism to be able to protect the integrity of the Tribunals and, therefore, their legacies as well.

In contrast to the Tribunals' Rules of Procedure and Evidence, the Statute of the Residual Mechanism requires consideration of whether to refer the case to national jurisdiction in accordance with Article 6 (1) of the IRMCT Statute, after taking into account the interests of justice and expediency, but before hearing the matter itself. This amendment appears to be the consequence for the Tribunals' practice of not referring contempt cases to national jurisdictions, despite having the power to do so.[121] Transferring cases of contempt could have reduced the Tribunals' workload. Therefore, Article 1 (4) obliges the Residual Mechanism to transfer contempt cases to national jurisdictions when the requirements are met in order to prevent the Residual Mechanism from taking over the Tribunals' practice.

According to the report 'on the completion of the mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015', the Tribunal heard claims regarding contempt of the Tribunal and false testimony, but these allegations have only led

[119] Secretary-General's Report, see note 58, para. 21; H. Brady and J. C. Nemitz, 'The Offence of Perjury under International Law: The False testimony of Witness L' Humanitäres Völkerrecht (1998) 162, 163; Göran Sluiter, 'The ICTY and Offences against the Administration of Justice' JICJ 2 (2004) 631, 632.

[120] Secretary-General's Report, see note 58, para. 23; Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY' in Albertus Henricus Joannes Swart, Alexander Zahar, Göran Sluiter (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, Oxford 2011), p. 9; Catherine Denis, 'Critical Overview of Residual Functions' of the Residual Mechanisms and its Date of Commencement (including Transitional Arrangements)' JICJ 9 (2011) 819, p. 826.

[121] *Prosecutor v. Blagoje Šimić et al.* (Case No. IT-95-9-R77), Judgment in the Matter of Contempt Allegations against an Accused and his Counsel, 30 June 2000; *Prosecutor v. Domagoj Margetić* (Case No. IT-95-14-R77.6), Judgement on all Allegations of Contempt, 7 February 2007; *Prosecutor v. Zlatko Aleksovski* (Case No. It-95-14/1-AR77), Judgement on Appeal by Anto Nobilo against Finding of Contempt, 30 May 2001.

to a few convictions.[122] The ICTY concluded contempt proceedings against 25 persons.[123] According to the report of the Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period, the Residual Mechanism has not conducted any trial proceedings in cases regarding contempt of court or false testimony allegations. But Single Judges have disposed of seven applications for the commencement of such proceedings.[124] Pursuant to the Residual Mechanism's Statute, a Single Judge is responsible for conducting cases regarding contempt of court or false testimony related to cases before the Tribunals or the Residual Mechanism. A three-judge bench of the Appeals Chamber of the Residual Mechanism will deal with any appeals from such trials, according to Rule 108 of the IRMCT RPE.

f. Progress of the Residual Mechanism regarding Judicial Activities

The Hague branch has commenced its first trial and appeals proceedings arising out of cases transferred from the ICTY. One retrial in the case of Jovica Stanišić and Franko Simatović is taking place in The Hague. In the case of Jovica Stanišić and Franko Simatović, the defence argued before the Residual Mechanism that the Prosecution intends to present evidence concerning allegations that should be excluded from the scope of the retrial because of the res judicata and non his in idem principles. But these arguments were unsuccessful. However, the Trial Chamber concluded that the presentation of new evidence at the retrial would prolong the proceedings. According to Article 19 (4) (c) IRMCT Statute, the accused has the right to be tried without undue delay. Therefore, the Trial Chamber pointed out that the Prosecution could only present evidence at the retrial that was already presented during the trial. In addition, the Trial Chamber noted that in exceptional circumstances the Prosecution is allowed to present new evidence where it is deemed to be in the interests of justice. [125] Further, at The Hague two appeals in the cases of Radovan Karadžić and Vojislav Šešelj are taking place. The Office of the Prosecutor will conduct appeal proceedings in the cases of Mladić and Hadžić.[126] It is anticipated that the cases of Karadžić and Šešelj will take approximately three years to complete from the

[122] *Report on the completion of the mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015,* UN Doc. S/2015/884, 17 November 2015, para. 35.
[123] *Assessment and report of Judge Carmel Agius, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) covering the period from 17 November 2015 to 17 May 2016,* Un Doc. S/2016/454, 17 May 2016, para. 4.
[124] *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 25; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, para. 36.
[125] *Prosecutor v. Jovica Stanišić and Franko Simatović* (Case No. MICT-15-96), Decision on Stanišić's Request for Stay of Proceedings, 2 February 2017, paras. 21- 23.
[126] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, para. 9; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2016,* UN Doc. S/2016/975, 17 November 2016, para. 34-36.

issuance of the trial judgement.[127] Regarding the cases of Hadžić and Mladić, it is anticipated that it will take two years and two-and-a-half to three years from the issuance of the trial judgements to the issuance of the appeal judgements, respectively. The timeframe foresees that in each case, approximately two thirds of the projected time for completion will be required for the preparation of the case for the appeals hearing. That will include adjudication of pre-appeal matters like requests for admission of additional evidence. It is anticipated that during that preparatory phase only the presiding judge will be required at one of the seats of the Residual Mechanism's branch to supervise the work in the case. The presiding judge is usually the President who also acts as the pre-appeal judge. However, the other judges on the bench will work remotely. When the case is ready for hearing, the judges will be called to hear the parties and then conduct deliberations. [128] Augustin Ngirabatware filed a request for review of his judgment in July 2016.[129] However, issues appeared because Judge Aydin Sefa Akay, who is a member of the Chamber considering the conviction of Augustin Ngirabatware, had been arrested in Turkey. The arrest of Judge Akay in September 2016 is connected to the failed coup in July 2016. Although he is entitled to diplomatic immunity, Judge Akay was sentenced to seven and a half years' imprisonment. Therefore, the proceedings in the case of Augustin Ngirabatware have remained at a standstill. The Residual Mechanism has referred the matter to the Security Council, because it held that Turkey failed to provide cooperation in accordance with Article 28 of the IRMCT Statute. But the Security Council has thus far refused to intervene in the matter, and Augustin Ngirabatware's application for temporary provisional release failed. The Pre-Review Judge held that he lacks the competence to consider the request. [130] In the case of Elizaphan Ntakirutimana, the Single Judge ordered the appointment of an amicus curiae to investigate allegations of false testimony. And in the case of Jean-Paul Akayesu, the Single Judge terminated the proceedings in order to investigate possible contempt.[131] However, this ad hoc judicial activity is temporary in nature.

According to the 'Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period', the Residual Mechanism is planning for the possibility of at least two fugitive trials at the Arusha branch and has

[127] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, paras. 3, 31- 32.
[128] *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 15.
[129] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2016,* UN Doc. S/2016/975, 17 November 2016, paras. 34-38.
[130] *Prosecutor v. Augustin Ngirabatware* (Case No. MICT-12-29-R), Order to the Government of the Republic of Turkey for the Release of Judge Aydin Sefa Akay, 31 January 2017, para. 17; *Prosecutor v. Augustin Ngirabatware* (Case No. MICT-12-29-R), Decision on Republic of Turkey's Non-Compliance with its Obligation to Cooperate with the Mechanism, 6 March 2017.
[131] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2016,* UN Doc. S/2016/975, 17 November 2016, para. 32.

budgeted for them.[132] Further, the Residual Mechanism continues to ensure that it is prepared to conduct appeals when any on-going proceedings at the ICTY result in an appeal or retrial.[133] According to 'Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016', because of past experience of trials at the Tribunals and the complexity of these cases, it is estimated that each trial may last two-and-a-half years from arrest until the delivery of the trial judgement.[134] Of these two-and-a-half years, approximately one year would be devoted to pretrial activity, which is mainly managed by a pretrial judge. Thus, there will only be the need for involvement of the full bench regarding certain key decisions during this phase of the pretrial proceedings. Unlike the pretrial or presiding judge, other members of the trial bench, will perform their functions remotely for each particular assignment. According to the 'Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period', the trial, deliberations, and judgement-drafting phase of a case where the involvement of the full bench is required could last approximately one-and-a-half years. Further, it is estimated that any resulting appeal from judgement would take two more years from the filing of the trial judgement to the delivery of the appeal judgement. According to the report, it is estimated that one month of pretrial activity and one month of trial activity at the Residual Mechanism will generate savings in judicial expenses of approximately one third of the cost at the Tribunal.[135] According to the Residual Mechanism's report 'on the progress of its work in the initial period', it is estimated that the Residual Mechanism would receive six requests for review per biennium. However, if a review is authorised, it is estimated that the proceedings will last one year from the filing of the initial request for review to the issuance of the review judgement.[136] Retrials ordered by the Appeals Chambers of the Residual Mechanism or by the Tribunals will require less time than full-scale trial proceedings. The reason is that the scope of a retrial is defined on a case-by-case basis and is usually limited to certain specific allegations or issues to be adjudicated at first instance.[137]

In accordance with Resolution 1966 (2010), the responsibility for tracking the remaining fugitives indicted by the ICTR was transferred to the Residual Mechanism on 1 July 2012. The Security Council required all states, especially those where fugitives are

[132] *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 20.
[133] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, para. 47.
[134] Ibid.
[135] *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 20.
[136] Ibid., para. 18.
[137] Ibid., para. 21.

suspected to be at large, to enhance cooperation with and render all necessary assistance to the Residual Mechanism in order to aid in the arrest and surrender of all remaining fugitives.[138] On 9 December 2015, Ladislas Ntaganzwa, one of the remaining fugitives indicted by the ICTR, was apprehended by authorities of the Democratic Republic of the Congo acting on an international arrest warrant issued by the Residual Mechanism.[139] On 20 March, officials of the Residual Mechanism's Registry facilitated the transfer of Ladislas Ntaganzwa to the custody of Rwanda, according to Rule 59 (B) of the IRMCT RPE, because the case of the fugitive was referred to Rwanda pursuant to Rule 11bis of the ICTR RPE.[140] In his report the Prosecutor points out the positive assistance and cooperation provided by the Democratic Republic of the Congo.[141] Three of the remaining fugitives fall within the jurisdiction of the Residual Mechanism: Félicien Kabuga, Augustin Bizimana, and Protais Mpiranya. However, the Office of the Prosecutor continues to search for information on the whereabouts of the other ICTR fugitives as well.[142] The cases of the other five fugitives have been referred to Rwanda. The assessment and progress report of the President of the Residual Mechanism, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016 points out that the arrest and prosecution of those remaining fugitives is a top priority for the Residual Mechanism.[143] The Office of the Prosecutor of the Residual Mechanism is working on reviewing existing leads regarding the whereabouts of the remaining fugitives to determine whether they should be further pursued or closed.[144] The Prosecutor notes that state cooperation is essential to successfully track and arrest the remaining fugitives.[145] In particular, the Office of the Prosecutor depends on the cooperation of state authorities to conduct arrest operations. In the second half of 2016, the Prosecutor and staff visited relevant African and European states in order to discuss further support for the Office's efforts to track fugitives and strengthen cooperation in conducting arrests. But the Office of the Prosecutor points out that incentives as well as potential sanctions are important in order to ensure cooperation.[146] Therefore, the Office of the Prosecutor also relies on the international community to provide incentives for states to cooperate.

[138] Ibid., para. 44.
[139] Ibid.
[140] Ibid., paras. 5, 46.
[141] Ibid., para. 5.
[142] Fulgence Kayishema, Charles Sikubwabo, Aloys Ndimbati, Ryandikayo and Phénéas Munyarugarama.
[143] Ibid., para. 44.
[144] Ibid., para. 7.
[145] Ibid., para. 8.
[146] Ibid.

g. Protection of Victims and Witnesses

The residual function regarding the continued protection of victims and witnesses is very important. Article 20 of the IRMCT Statute governs the protection of victims and witnesses and is a reproduction of Article 22 of the ICTY Statute and Article 21 of the ICTR Statute. According to this provision, since the Commencement Date of each branch, the Residual Mechanism has to provide protection for victims and witnesses of the Tribunals as well as the Residual Mechanism. The protective measures include pseudonyms, facial and voice distortion of their recorded testimony, private and closed court sessions, as well as relocation of the most at-risk witnesses, sometimes even to third countries. In addition, the implementation of protective orders involves 'keeping track of protected witnesses and informing them, where necessary, of the release of convicted persons in whose cases they have testified; providing a contact point for protected witnesses who wish to have their protective measures amended or who need additional support; and maintaining cooperation with States where protected witnesses have been relocated.'[147] The Office of the Prosecutor is also able to implement protective measures in order to support the investigations and the prosecution at trial.[148]

The protective measures ordered in proceedings before the Tribunals continue to have effect in any other proceedings before the Residual Mechanism or another jurisdiction unless the measures are rescinded, varied, or augmented.[149] For instance, if an accused person in other proceedings needs access to relevant information for his or her defence, it will be necessary to vary the protective order. This also applies when a party needs access to information relevant to its case in national proceedings or national immigration authorities need access to information that are relevant to asylum or immigration requests of a protected witness. According to Rule 86 (H) of the IRMCT RPE, victims, witnesses, and judges in other jurisdictions can directly petition the Residual Mechanism for variation of protective measures ordered by the Tribunals or the Residual Mechanism. But an important aspect of this procedure is that the rescission, variation, or augmentation of protective measures can only be ordered when the victim or witness gives his or her consent.[150] That provision is similar to Rule 75 (H) of the ICTY RPE and Rule 75 (H) of the ICTR RPE and is essential for the Residual Mechanism to allow national authorities to continue using confidential documents under the control of an international institution. After the closing of the Tribunals this activity requires at least some judicial

[147] Secretary-General's Report, see note 58, para. 26-27.
[148] Rule 39 (ii) of the ICTY RPE; Rule 39 (ii) of the ICTR RPE; Rule 36 (ii) of the IRMCT RPE.
[149] *Prosecutor v. Jean Paul Akayesu* (Case No. MICT-13-30), Order of the Registrar's Rule 31 (8) Submission of the 28 April 2016, 2 June 2016; Rule 75 ICTY RPE; Rule 75 ICTR RPE; Rule 86 IRMCT RPE.
[150] Rule 86 (I) of the IRMCT RPE.

authority for the case that protective measures need to be varied. The Residual Mechanism is necessary to keep track of the various protective measures ordered by the Tribunals.

The Tribunals made the necessary arrangements to ensure a transition of victims and witness protection functions to the Residual Mechanism for all completed cases of the Tribunals.[151] In the case of a trial or referral proceeding that has to be completed by one of the Tribunals in accordance with Article 1 of the Transitional Arrangements, the Tribunal remains competent to provide for the protection of victims and witnesses connected to that case until its completion.[152] According to the report of the Residual Mechanism's President, the Witness Support and Protection Unit have been fully operational since the Commencement Date of each branch. It offers protection for thousands of witnesses who testified before the Tribunals. The great majority of the Tribunals' witnesses enjoy protection.[153] According to the report, the Unit ensures that the witnesses receive the same standards of protection that were previously offered by the Tribunals.[154] At the Arusha branch, the Residual Mechanism also provides medical and psychosocial care to victims and witnesses residing in Rwanda, including specialised care for witnesses who were victims of sexual violence during the Rwandan genocide.[155] Both branches are working on the implementation of a pilot study on the long-term impact that testifying before the Tribunals may have on witnesses.[156] Additionally, the Residual Mechanism is establishing a common information technology platform for their respective witness databases as part of the maintenance of records connected to witnesses received from the Tribunals.[157]

According to the 'Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period' dated 20 November 2015, it is expected that victim and witness protection will continue to be required in the future, because many judicial protection orders will remain in force unless rescinded or waived.[158] Therefore, the issuance of witness protection orders by a Chamber constitutes an ad hoc judicial function, but the implementation of witness protection is an on-going administrative function for the Registry.[159] The great majority of the Tribunals' witnesses enjoy protection. By May 2009, more than 1,400 ICTY witnesses and 2,300 ICTR

[151] Article 5 (4) of the Transitional Arrangements.
[152] Article 5 (1) of the Transitional Arrangements.
[153] *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 56; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, paras. 38-39.
[154] Ibid.
[155] Ibid.
[156] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, para. 41.
[157] Ibid., para. 42.
[158] Ibid., para. 43.
[159] Ibid., para. 25.

witnesses were subject to protective orders.[160] The Tribunals have highlighted that adequate monitoring and protection of victims and witnesses is essential to ensure their continued participation in future proceedings of the Tribunals and the Residual Mechanism. Moreover, the urgency of this task stems from the fact that witness and victim protection is crucial for maintaining public confidence in the international criminal justice system.[161]

h. Sentence Enforcement

Article 25 of the IRMCT Statute regulates sentence enforcement and provides that imprisonment has to be served in a state designated by the Residual Mechanism from a list of states with which the UN has agreements for this purpose. In addition, the imprisonment must be in accordance with the applicable law of the state concerned and furthermore subject to the supervision of the Residual Mechanism.[162] The process of enforcement remains the same as under the Tribunals Statutes. Hence, Article 25 (1) of the IRMCT Statute mirrors Articles 27 of the ICTY Statute and 26 of the ICTR Statute, respectively. However, Article 25 (2) of the IRMCT Statute is different in two aspects. First, Article 25 (2) of the IRMCT Statute determines a new provision that empowers the Residual Mechanism with supervision over the enforcement of sentences pronounced by the ICTY, the ICTR, or the Residual Mechanism. Hence, it allows the Residual Mechanism to supervise the enforcement of sentences pronounced by the Residual Mechanism and by the Tribunals. In several cases the question appeared of whether persons convicted and sentenced by the Tribunals should be considered 'similarly-situated' to persons convicted and sentenced by the Residual Mechanism for purposes of early release determinations.[163] It was ruled that all prisoners supervised by the Residual Mechanism should be treated equally.[164] Therefore, in the interests of equal treatment of all convicts supervised by the

[160] Secretary-General's Report, see note 58, para. 28.
[161] Ibid., para. 29; David Tolbert, 'The Ends of international Justice. Closing International Tribunals: Issues and Prospects at the Closing of the First International Courts' IJT (2008) 20.
[162] Article 25 (1) of the IRMCT Statute.
[163] *Prosecutor v. Paul Bisengimana* (Case No. MICT-12-07) Decision of the President on Early Release of Paul Bisengimana and on Motion to File a Public Redacted Application, 11 December 2012, para. 16.
[164] Ibid., para. 17-21; *Prosecutor v. Ranko Češić* (Case No. MICT-14-66-ES), Public Redacted Version of the 30 April 2014, Decision of the President on the Early Release of Ranko Češić, 28 May 2014, para. 16; *Prosecutor v. Florence Hartmann* (Case No. MICT-15-87-ES), Decision of the President on the Early Release of Florence Hartmann, 29 March 2016, paras.18-20; *Prosecutor v. Dario Kordić* (Case No. MICT-14-68-ES), Public Redacted Version of the 21 May Decision of the President on the Early Release of Dario Kordić, 6 June 2014, para. 17; *Prosecutor v. Radislav Krstić* (Case No. MICT-13-46-ES), Decision of the President on the Early Release of Radislav Krstić, 13 December 2016, paras. 16-18; *Prosecutor v. Kvočka et al.* (Case No. MICT-14-81-ES), Public Redacted Version of the 10 November 2014 Decision of the President on the Early Release of Zoran Žigić, 23 December 2014, paras. 15-17; *Prosecutor v. Milutinović et al.* (Case No. MICT-14-67-ES), Public Redacted Version of the 10 July 2015 Decision of the President on the Early Release of Nikola Šainović, 27 August 2015, paras. 17-19; *Prosecutor v. Youssouf Munyakazi* (Case No. MICT-12-18-ES.I), Public Redacted Version of the 22 July 2015 Decision of the President on the Early Release of Youssouf Munyakazi, 22 July 2015, paras. 14-15; *Prosecutor v. Dragan Zelenović* (Case No. MICT-15-89-ES) Public Redacted Version of the August 2015 Decision of the President on the Early Release of Dragan Zelenović, 15 September 2015, paras. 14-15; *Prosecutor v. Popović et al.* (Case No. MICT-15-85-ES.4) Public Redacted Version of the 20 July 2015 Decision of the President on the Early Release of Drago Nikolić, 13 October 2015, para. 19; *Prosecutor v. Nahimana et al.* (Case No. MICT-13-37-ES.I) Public Redacted Version of the 22 September 2016 Decision of the President on the Early Release of Ferdinand Nahimana, 5 December 2016, paras. 19-20; *Prosecutor v. Milomir Stakić* (Case No. MICT-

Residual Mechanism, the relevant practice of the Tribunals needs to be uniformly applied to all prisoners supervised by the Residual Mechanism. Second, it gives the Residual Mechanism the authority to supervise 'implementation of sentence enforcement agreements earlier entered into by the United Nations with Member States and other agreements with international and regional organisations and other appropriate organisations and bodies'. [165]

Article 26 of the IRMCT Statute governs the pardon or commutation of sentences and mirrors the Articles 28 of the ICTY Statute and 27 of the ICTR Statute. According to this provision, a person convicted by the Tribunals or the Residual Mechanism is eligible for a pardon or commutation of the sentence if the applicable law of the state, in which the person is imprisoned, allows it. But the concerned state has to notify the Residual Mechanism immediately. However, there may only be pardon or commutation of sentence if the President of the Residual Mechanism agrees to it based on the interests of justice and the general principles of law. Compared to Articles 28 of the ICTY Statute and 27 of the ICTR Statute, there are two minor differences: pursuant to Article 26 of the IRMCT Statute, the states have to notify the Residual Mechanism instead of the Tribunals in the case that a convicted person is eligible for pardon or commutation of sentence; and second, whereas pursuant to the Tribunals' Statutes the President determines the case in consultation with the judges, under the Statute of the Residual Mechanism the President decides the case alone. Rule 149 of the IRMCT RPE echoes Article 26 of the IRMCT Statute and provides that the enforcing state shall notify the Residual Mechanism in the case of a convicted person's eligibility under the enforcing state's laws 'for pardon, commutation of sentence, or early release'. Rule 150 of the IRMCT RPE provides that upon such notice the President of the Residual Mechanism determines, after consulting any judge of the sentencing chamber, whether pardon, commutation of sentence, or early release is appropriate. Rule 151 of the IRMCT RPE provides that in making a determination on pardon, commutation of sentence, or early release, the President of the Residual Mechanism needs to consider, for example, the gravity of the crime for which the prisoner was convicted, the prisoner's demonstration of rehabilitation, the past treatment of similarly-situated prisoners, and any cooperation with the Prosecution.[166] For example, in the case of Oded Ruzindana it was considered that upon the completion of two-thirds of

13-60-ES), Decsion of the President on Sentence Permission of Milomir Stakić Public Redacted Version, 17 March 2014, paras. 17-18; *Prosecutor v. Stanislav Galić* (Case No. MICT-14-83-ES), Public Redacted Decision of the President on the Early Release of Stanilsav Galić, 18 January 2017, paras. 19- 23.

[165] Article 25 (2) of the IRMCT Statute.

[166] *Prosecutor v. Paul Bisengimana* (Case No. MICT-12-07), see note 163, para. 10; *Prosecutor v. Zdravko Tolimir (Case No. MICT-15-95-ES)*, Public Redacted Version of the 'Decision on Motion for Provisional Release Filed' on 28 January 2016, 23 February 2016, para. 30.

the sentence, all convicted persons supervised by the Residual Mechanism are eligible for early release.[167] The two-thirds practice was implemented by the ICTY but applies to all prisoners within the jurisdiction of the Residual Mechanism because of the need for equal treatment. However, the convicted person is merely eligible to apply for early release and is not entitled to. The President of the Residual Mechanism decides on such cases as a matter of discretion after considering the totality of the circumstances.[168]

When an accused person seems not to be eligible for release during the pretrial phase, trial, and appellate proceedings, the accused will be kept in the custody of the Residual Mechanism. However, once the final judgement is delivered, the convicted person will be transferred to a state chosen from a list of states that accept convicted persons.[169] The list consists of states that have concluded agreements to this effect or have indicated their willingness to accept convicted persons. Thus, persons convicted by the Residual Mechanism do not serve their sentences in the detention facilities of the Residual Mechanism but in one of the countries that has signed an agreement on enforcement of sentences.[170] The Residual Mechanism relies on the cooperation of states for the enforcement of sentences. The sentences are served within the territory of member states of the UN, which concluded enforcement-of-sentence agreements or were willing to accept convicted persons under any other arrangement. The agreements concluded by the UN for the two Tribunals remain in force for the Residual Mechanism. A new agreement between the UN and the Government of Mali was signed on 13 May 2016, providing for the enforcement of sentences pronounced by either the Residual Mechanism or the ICTR. However, this agreement was the first agreement entered into force since the commencement of the Residual Mechanism. The Residual Mechanism continues its efforts to secure additional agreements to increase its enforcement capacity for both branches.[171]

As of 1 July 2012 for ICTR cases and 1 July 2013 for ICTY cases, the Residual Mechanism has the jurisdiction to designate enforcement states, including for persons who have been convicted thereafter by the two Tribunals. Since the transfer of this function on 1 October 2015, the Residual Mechanism has managed and operated the UN Detention

[167] *Prosecutor v. Obed Ruzindana* (MICT-12-10-ES), Decision of the President on the Early Release of Obed Ruzindana, 13 March 2014, para. 14.
[168] Ibid.
[169] Article 25 (1) of the IRMCT Statute; Rule 103 of the ICTY RPE. On the enforcement of sentences by the ICTY see: David Tolbert, 'The International Tribunal for the former Yugoslavia and the Enforcement of Sentences' LJIL 11 (1998) 655, 656.
[170] ICTY has concluded agreements with Italy, Finland, Norway, Austria, Sweden, France, Spain,
Denmark, the United Kingdom of Great Britain and Northern Ireland, Belgium, Ukraine, Portugal, Estonia, Slovakia, Poland and Albania, and ad hoc agreements with Germany, http://www.icty.org/sections/LegalLibrary/MemberStatesCooperation (last visited 11 April 2017). ICTR has concluded agreements with Mali, Benin, Swaziland, France, Italy, Sweden and Rwanda, http://69.94.11.53/ENGLISH/agreements/index.htm (last visited 11 April 2017).
[171] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, para. 56.

Facility in Arusha.[172] The Arusha branch is supervising the enforcement of 23 sentences either in Benin (10) or Mali (13).[173] Further, ten convicted individuals are at the UN Detention Facility in Arusha awaiting transfer to an enforcement state. Regarding The Hague branch, the Residual Mechanism relies on the provision of detention services by the ICTY at the UN Detention Unit.[174] The Hague branch is supervising the enforcement of 17 convicted persons in nine states. The sentences are being served in Denmark (1), Estonia (3), Finland (2), France (1), Germany (5), Italy (1), Norway (1), Poland (2) and Sweden (1).[175] The Registry of the Residual Mechanism continues to implement existing enforcement agreements, and amends the agreements if necessary.

The Residual Mechanism engaged the services of an independent expert in prison management in November 2012 to assess the needs of the prisons in Benin and Mali that are enforcing sentences of the ICTR and to develop context-based recommendations. The Residual Mechanism continues to make steady progress in Mali on implementing the recommendations of the independent prison management expert.[176] According to the first annual report, the Residual Mechanism has regularly asked for advice from the Department of Safety and Security and the designated official in Mali relating the security situation in Mali.[177]

i. Cooperation and Judicial Assistance

Article 28 (1) of the IRMCT Statute governs the judicial assistance and cooperation of states and provides that states have to work with the Residual Mechanism in the investigation and prosecution of persons covered by Article 1 of the IRMCT Statute. Hence, in contrast to the Tribunals' Statutes, Article 1 (4) of the IRMCT Statute includes the crimes of contempt and false testimony, which were not previously the subject of mandatory cooperation.[178] Further, states have to cooperate with the Residual Mechanism without undue delay regarding any request for assistance or an order issued by a Single Judge or Trial Chamber. Assistance includes but is not limited to identifying and locating

[172] Ibid., para. 48.
[173] Ibid., para. 57. 16 Sentences are being enforced in Benin and 12 in Mali.
[174] Ibid., para. 49.
[175] Two sentences are being enforced in Denmark, three in Estonia, two in Finland, one in France, five in Germany, one in Italy, one in Norway, two in Poland and on in Sweden. *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, para. 58; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2016,* UN Doc. S/2016/975, 17 November 2016, paras. 69-70.
[176] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, para. 60; *First Annual Report of the International Residual Mechanism for Criminal Tribunal*s, UN Doc. S/2013/464, 2 August 2013, para. 69.
[177] Ibid.
[178] Article 28 (1) of the IRMCT Statute.

persons, taking testimony and producing evidence, the service of documents, arresting of persons, and the surrender or the transfer of the accused to the Residual Mechanism.[179]

A further development is outlined in Article 28 (3) of the IRMCT Statute, which includes an on-going residual function. Article 28 (3) obliges the Residual Mechanism to respond to requests for assistance from national authorities regarding the prosecution and trial of those responsible for serious violations of international humanitarian law in the affected areas. This includes providing assistance in tracking fugitives whose cases have been referred to national authorities by the Tribunals or the Residual Mechanism. Article 28 (3) of the IRMCT Statute provides an example of the codification of Tribunal practice. It is an obligation on the Residual Mechanism to work with the national authorities. In contrast, the Tribunals' Statutes do not contain such provisions, but it has been the practice of the Tribunals and the Prosecutor to respond requests from national authorities.[180] Before the amendments to the ICTY RPE, when assistance was requested, the Prosecutor would petition the Chamber for access on behalf of the relevant national authority.[181] As part of the Completion Strategy and because of the transfer of the cases to national jurisdiction, pursuant to Rule 11bis of the ICTY RPE the judges of the ICTY initiated amendments to the ICTY RPE, which provided national jurisdictions with the following: first, to request assistance from the Tribunal in obtaining testimony from persons in the custody of the Tribunal in accordance with Rule 75bis of the ICTY RPE, and second, to request the transfer of individuals in order to give evidence in other jurisdictions according to Rule 75ter of the ICTY RPE. However, although these Rules have no basis in the ICTY Statute, they were created according to the mandate conferred by the Security Council upon the ICTY, through Resolution 1503 (2003) and Resolution 1534 (2004), in order to help the national jurisdiction build its capacity.[182] This obligates the Residual Mechanism to provide judicial assistance to states in criminal matters. It 'essentially mirrors typical bilateral or multilateral arrangements on judicial assistance between States'.[183]

Assisting national authorities was an important element of the Tribunals' work. Each Office of the Prosecutor responded regularly to requests for assistance from national prosecutors, national immigration authorities, and UN agencies, as the Tribunals moved

[179] Article 28 (2) of the IRMCT Statute.
[180] *Report on the Completion Strategy of the International Criminal Tribunal for the Former Yugoslavia 2011,* UN Doc. S/2011/316, paras. 76-78; *President of the ICTR, Report on the Completion Strategy of the International Criminal Tribunal for Rwanda 2011,* UN Doc. S/2011/317, 18 May 2011, paras. 52-53, 67-69; Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 943.
[181] Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 943.
[182] UN Security Council Resolution 1503 (2003), see note 31, para. 1; UN Security Council Resolution 1534 (2004), see note 59, para 9. Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 944.
[183] Dagmar Strob, 'State Cooperation with the International Criminal Tribunals for the Former Yugoslavia and Rwanda' Max Planck UNYB 5 (2001) 249, 270; Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 944.

towards completion.[184] The Residual Mechanism receives requests regarding domestic proceedings concerning individuals allegedly implicated in the genocide in Rwanda or the conflicts in former Yugoslavia. The requests include the decision of the Office of the Prosecutor as to whether confidential documents may be disclosed.[185] Article 28 (3) of the IRMCT Statute specifies that the Residual Mechanism shall provide 'assistance in tracking fugitives whose cases have been referred to national authorities by the ICTY, the ICTR, or the Residual Mechanism.' This function will involve an important workload for the Office of the Prosecutor because there are still suspects who potentially could be prosecuted before national jurisdictions as well as fugitives of the ICTR.

Comprehensive information and guidance for those who wish to request assistance are available on the Residual Mechanism's website.[186] Thanks to their investigative activities, the Office of the Prosecutor of each Tribunal has not only gathered a large amount of evidentiary material, but has provided material and know-how to national authorities.[187] According to the Secretary-General's report, the Tribunals considered this on-going function essential to ensure the ability of the national jurisdictions to conduct the trials of persons who were not subject to proceedings before the Tribunals.[188] Since 1 July 2012 for requests to the ICTR and 1 July 2013 for requests to the ICTY, the Residual Mechanism has responded to requests for assistance from national authorities regarding national investigations, prosecutions, and trials.[189] But the Residual Mechanism not only responds to requests for assistance from Rwanda and former Yugoslavia. This residual function comprises the provision of assistance to national jurisdictions trying related proceedings. This includes responding to requests for evidence, transferring dossiers, sending requests to question detained persons, and ordering the variation or rescission of protective measures for victims and witnesses.

The Tribunals have collected more than 10 million pages of documents and statements, as well as thousands of audio recordings, video recordings, electronic records

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[184] Secretary-General's Report, see note 58, para. 5; In relation to the former Yugoslavia, the Office of the Prosecutor received 128 requests for assistance from six Member States and two international organizations; 99 requests for assistance were submitted by authorities in Bosnia and Herzegovina, 9 were from Serbia and 12 were from Croatia. In addition, the Office filed submissions in relation to 15 requests for variation of witness protective measures, all of which concerned proceedings in Bosnia and Herzegovina. In relation to Rwanda, the Office of the Prosecutor received 11 requests for assistance from four Member States and one international organization. Authorities of Rwanda submitted none of the requests for assistance. In addition, the Office filed submissions in relation to one request for variation of witness protective measures, which concerned a proceeding in France. *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, paras. 30- 31.

[185] UN Security Council Resolution 1534 (2004), see note 59, para. 6; *Report on the completion strategy of the International Criminal Tribunal for Rwanda (as of 1 November 2010),* UN Doc. S/2010/574, 5 November 2010, paras. 50-51; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016*, UN Doc. S/2016/453, para. 80.

[186] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, para. 80.

[187] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 120, p. 11.

[188] Secretary-General's Report, see note 58, para. 40.

[189] Article 6 of the Transitional Arrangements.

and artefacts.[190] This collection of records contains evidence of many crimes that were not prosecuted by the Tribunals and is of unique importance to national and international authorities. Between 1 July 2012 and October 2015, the Office of the Prosecutor dealt with over 850 requests for assistance from 15 countries and international organisations.[191] Hence, due to the high number of requests for assistance, The Hague branch continued to employ staff members on a temporary contract to assist in responding to requests for assistance.[192] According to the President's report, although some national authorities have online access to parts of the records and the Office of the Prosecutor has streamlined the processing of requests for assistance, the handling of such requests remains work intensive.[193] However, the Office of the Prosecutor also provides other forms of assistance, such as facilitating access to prosecution witnesses in order to get their consent for the variation of protective measures. But the Registry also has received and responded to over 250 requests for assistance by national authorities or parties to national proceedings related to the genocide in Rwanda or the conflict in the former Yugoslavia.[194]

In comparison with other functions, this type of activity seems to have a relatively short time frame and will eventually merge with the management of the archives that is discussed below. It is expected that these activities will continue for a considerable time. More recently, the Office has received other kinds of requests for assistance, such as requests to monitor proceedings in Rwanda with regard to genocide-related cases in which the accused have been extradited to Rwanda from other countries. [195]While the Office cannot provide such assistance outside its mandate, this example nevertheless indicates the increasing number and variety of requests for assistance that it is called upon to provide. Therefore, the Residual Mechanism has the important task of monitoring the referred cases but also provides information regarding other related proceedings without risking the safety of victims and witnesses. Although the national authorities' need for help in the affected countries will decrease over the time, the Residual Mechanism will be able to give advice regarding future proceedings related to war crimes and the violation of human rights.

[190] *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 43.
[191] Ibid.
[192] Ibid., para. 42.
[193] Ibid.
[194] Ibid.
[195] Ibid., para. 44.

D. Rights of the Accused

All of the fair trial rights accorded to accused persons under the IRMCT Statute are derived from the Statutes of the Tribunals. Analogous to Article 9 of the ICTR Statute and Article 10 of the ICTY Statute, the legal principle non bis in idem is found in Article 7 of the IRMCT Statute. This principle provides that if a person has already been tried before the Tribunals or the Residual Mechanism for acts constituting serious violations of international humanitarian law, they shall not be tried before a national court for the same act. Paragraph (2) regulates the exception to this. Pursuant to Article 7 (2) of the IRMCT Statute, an individual covered by Article 1 of the IRMCT Statute who was tried before a national court for acts regarding serious violations of international humanitarian law can still be tried by the Residual Mechanism in that case the act for which the individual was tried, was characterised as an ordinary crime or 'the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted'.[196] But when deciding on the penalty for a crime under the IRMCT Statute, the Residual Mechanism has to take into consideration any penalty already imposed by a national court on the same individual for the same act.[197] In the case of Jean Uwinkindi, the Appeals Chamber made clear that Article 7 (1) of the IRMCT Statute expressly refers to acts on the basis of which the person was tried. A final judgment needs to be rendered. Therefore, Article 7 (1) does not prohibit subsequent prosecutions in national jurisdictions where the final judgement was not rendered.[198]

Article 19 of the IRMCT Statute covers the fair trial rights that are guaranteed to accused persons and is a copy of the Article 21 of the ICTY Statute and Article 20 of the ICTR Statute.[199] The only difference is the gender-neutral language in the IRMCT Statute. According to Article 19 (1) of the IRMCT Statute, all persons shall be treated equally by the Residual Mechanism. The accused is entitled to a fair and public hearing before charges are determined.[200] The principle of the presumption of innocence is set forth in Article 19 (3) of the IRMCT Statute. Further, Article 19 (4) of the IRMCT Statute enumerates the minimum guarantees to which the accused is entitled and which are granted in full equality:[201]

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[196] Article 7 (2) (a)-(b) of the IRMCT Statute.
[197] Article 7 (3) of the IRMCT Statute.
[198] *Prosecutor v. Jean Uwinkindi (*Case No. MICT-12-25-AR14.1), Decision on an Appeal Concerning a Request for Revocation of a Referral', 4 October 2016, para. 27.
[199] These rights are derived from Article 14 of the International Covenant on Civil and Political rights, and are considered to have the status of customary law. See *Prosecutor v. Aleksovski, Judgement* (Case No. IT-95-14/1-A), 24 March 2000, para. 104.
[200] Article 19 (2) of the ICTR Statute.
[201] Article 19 (4) (a)- (g) of the IRMCT Statute.

(a) The accused has to be informed immediately in detail in a language, which he understands, of the nature and cause of the charges against him.
(b) The accused must have sufficient time and facilities to prepare his defence and he has to be able to communicate with the counsel of his own choice.
(c) The accused has to be tried without undue delay.
(d) The accused has to be tried in his or her presence and has to be allowed to defend himself in person or through a legal assistance of his own choice. The accused must be informed in the case he does not have legal assistance. Also the accused has the right to have legal assistance assigned to him, in the case where the interests of justice require it and without payment by him or her in such case if he or her is not able to afford the legal assistance.
(e) The accused has the right to examine the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
(f) The accused shall have a free assistance of an interpreter if he does not understand or speak the language used in the IRMCT.
(g) The accused cannot be compelled to testify against himself or herself or to confess guilt.

In her case, Florence Hartmann requested legal aid regarding the remuneration of her counsel. The counsel is to provide assistance concerning her arrest and detention.[202] According to Article 19 (4) (d) of the IRMCT Statute, the accused is entitled to have legal assistance even if they are unable to pay for it.

But in the case of Florence Hartmann the question appeared, as to whether the Residual Mechanism is required to provide legal aid in cases where a final judgement has already been issued. The Appeals Chamber of the Residual Mechanism held that only in exceptional circumstances is a convicted person entitled to legal assistance at the expense of the Residual Mechanism after a final judgement has been rendered.[203] The Residual Mechanism is not obliged to assist with any new investigation the accused person would like to conduct or any new motion he or she may wish to bring by assigning the accused legal assistance at the expense of the Residual Mechanism.[204] The Statutes of the Tribunals and the IRMCT Statute do not provide for assignment of counsel to convicted persons following the issuance of final judgements against them. Article 19 of the IRMCT Statute concerns accused persons, and Hartmann is no longer an accused person because the

[202] *Prosecutor v. Florence Hartman* (Case No. MICT-15-87-ES), Decision of the President on the Urgent Request for Legal Aid, 29 March 2016, para. 9.
[203] Eliézer Niyitegeka v. The Prosecutor (Case No. MICT-12-16-R), Decision on Niyitegeka's Request for Review and Assignment of Counsel, 13 July 2015, para. 8.
[204] Ibid.

appeal judgement was already issued. Hartman's argument that general human rights law guarantees a right of paid representation regardless of the stage of the proceedings concerned was held as ill founded.[205] Further, Hartmann argued that the absence of a clear legal system regarding legal aid in post-conviction situations means that there is no adequate legal certainty. This would constitute a serious interference with the rights guaranteed under the IRMCT Statute.[206] That argument was held as unpersuasive, because Article 19 of the IRMCT Statute concerns accused persons.[207] However, in the case of Florence Hartmann, exceptional circumstances existed warranting a limited grant of legal assistance in the interests of justice. The exceptional circumstances applied in that case because of the urgent and unusual nature of the proceeding, including the length of Hartmann's sentence, and her request for early release.[208] As the Residual Mechanism needs to be cost efficient, it is necessary to examine whether legal aid is required in each particular case. But in any event, the convicted person needs to be able to make effective use of further available remedies. Otherwise, the rights of the convicted person would be jeopardized. However, the possibility to grant legal aid in the interests of justice in cases where exceptional circumstances exist is adequate to ensure the rights of convicted persons.

E. Penalty

Besides the Trial Chamber, according to Article 21 (1) of the IRMCT Statute, the Single Judge is allowed to pronounce the judgement and impose the sentence and penalty on a person covered by Article 1 of the IRMCT Statute, who is convicted by the Residual Mechanism.[209] In addition, all the judgements have to be delivered in public and have to be accompanied by a reasoned opinion in writing. Similar to the Tribunals' Statutes, the judgement by a Chamber has to be rendered by a majority of the judges, to which separate or dissenting opinions may be appended.[210]

Article 22 of the IRMCT Statute limits penalties to imprisonment for persons covered by Article 1 (2) and (3) of the IRMCT Statute. Further, the penalty imposed on persons who are convicted for crimes of contempt or false testimony should not exceed seven years. However, the maximum penalty for contempt under Article 77 (G) of the

[205] Pose*cutor v. Florence Hartman* (Case No. MICT-15-87-ES), see note 202, para. 10.
[206] Ibid., para. 11.
[207] Ibid., para. 14.
[208] Ibid., 15.
[209] See Article 22 (1) of the ICTR Statute, Article 23 (1) of the ICTY Statute.
[210] Article 21 (2) of the IRMCT Statute, Article 22 (2) of the ICTR Statute, Article 23 (2) of the ICTY Statute; *Prosecutor v. Milan Lukić and Sredoje Lukić* (Case No. MICT-13-52-R.1), Dissenting Opinion of Judge Jean-Claude Antonetti, 1 October 2015, p. 8.

ICTY RPE is seven years' imprisonment or a 10 000 EUR fine or both, and under Article 77 (G) of the ICTR RPE is five years or 10 000 USD fine or both.

F. Administrative Provisions

Article 29 of the IRMCT Statute covers the privileges, status, and immunities of the Residual Mechanism. The Convention on the Privileges and Immunities of the UN of 13 February 1946 applies to the Residual Mechanism, the archives of the Residual Mechanism and the Tribunals, the judges, the Prosecutor and the Registrar, and their staff. According to Article 29 (2) of the IRMCT Statute, the Prosecutor, the President, and the Registrar have the same immunities, privileges, exemptions, and facilities as diplomatic envoys. And the Residual Mechanism's judges enjoy the same immunities, privileges, exemptions, and facilities when working for the Residual Mechanism. Although the judges do not serve full-time, they enjoy the same privileges, immunities, exemptions, and facilities when they are engaged in the business of the Residual Mechanism.[211] In addition, the staff of the Registrar and the Prosecutor have the same immunities and privileges accorded to officials of the UN, according to Articles V and VII of the Convention referred to in Article 29 (1) of the IRMCT Statute.[212] Article 29 (4) of the IRMCT Statute determines the privileges and immunities applicable to the defence counsel. He or she enjoys the same immunities and privileges as are accorded to experts on mission for the UN, pursuant to Article VI, Section 22, paragraphs (a) to (c), and Section 23 of the Convention referred to in Article 29 (1) of the IRMCT Statute. This applies when the Defence counsel holds a certificate certifying that the Residual Mechanism has admitted him or her as counsel. The defence counsel has the duty to respect the regulations and laws of the receiving state. Finally, according to paragraph 5, other persons required at the seats of the Residual Mechanism also have to be accorded such treatment, as this is necessary for the Residual Mechanism to work properly.

Regarding the expenses of the Residual Mechanism, Article 30 of the IRMCT Statute provides that the expenses are expenses of the organisation in accordance with Article 17 of the UN Charter. According to Article 31 of the IRMCT Statute and Rule 2 (A) of the IRMCT RPE, the working languages of the Residual Mechanism are English and French. Article 30 and Article 31 of the IRMCT Statute are equivalent with the Tribunals' provisions.[213]

[211] Article 29 (2) of the IRMCT Statute.
[212] Article 29 (3) of the IRMCT Statute.
[213] Article 32 and Article 33 of the ICTY Statute; Article 30, and Article 31 of the ICTR Statute.

Finally, pursuant to Article 32 of the Residual Mechanism, the President of the Residual Mechanism must submit an annual report on the Residual Mechanism to the Security Council and the General Assembly. In addition, the President and Prosecutor of the Residual Mechanism have a semi-annual reporting obligation to the Security Council, which was not previously set forth in the ICTY or ICTR Statutes. However, the Tribunals have the obligations to submit an annual report, and a semi-annual completion strategy report to the Security Council pursuant to Resolution 1534 (2004).[214]

3. Transitional Arrangements – Annex 2

According to the operative clauses of Resolution 1966, the provisions of the IRMCT Statute, the ICTY Statute and ICTR Statute are subject to the Transitional Arrangements set out in Annex 2 to Resolution 1966.[215] The aim of the Transitional Arrangements is to ensure a smooth transition of main functions from the Tribunals to the Residual Mechanism.[216] Decisions made by a Trial or Appeals Chamber of the Tribunals while properly seized of the matter and prior to the Commencement Date retain their validity before the Residual Mechanism.[217]

A. Trial Proceedings

Article 1 (1) of the Transitional Arrangements provides that as of the Commencement Date of each branch of the Residual Mechanism, the Tribunals have the competence to complete all trial or referral proceedings pending before them. In addition, the Tribunals have the power to conduct and complete trial proceedings or to refer the case to the national jurisdiction as appropriate 'if the fugitive is arrested more than 12 months, or if a retrial is ordered by the Appeals Chamber more than 6 months prior to the start of the Residual Mechanism'.[218] If a person indicted by the Tribunals is arrested 12 months or less prior to the start, or if a retrial is ordered 6 months or less prior to the commencement of the respective branch of the Residual Mechanism, the Tribunals only have the power to prepare the trial or to refer the case to national authorities.[219] Although the function of post-closure trials is the most complex for the Residual Mechanism to manage, it is of

[214] UN Security Council Resolution 1534 (2004), see note 59, para. 6; *Fourth annual report of the International Residual Mechanism for Criminal Tribunals,* UN Doc. A/71/262 S/2016/669, 1 August 2016; *Third annual report of the International Residual Mechanism Criminal Tribunals*, UN Doc. A/70/225 S/2015/586, 31 July 2015; *Second annual report of the International Residual Mechanism for Criminal Tribunals,* UN Doc. A/69/226 S/2014/555, 1 August 2014; *First Annual Report of the International Residual Mechanism for Criminal Tribunals,* UN Doc. A/68/219 S/2013/464, 2 August 2013.
[215] UN Security Council Resolution 1966 (2010), see note 11, preamble.
[216] Ibid., para. 2.
[217] *Prosecutor v. Jean de Dieu Kamuhanda* (Case No. MICT-13-33), Decision on Motion for Appointment on Amicus Curiae Prosecutor to Investigate Prosecution Witness Gek, 16 September 2015, para. 10; *In Re. Deogratias Sebureze and Maximilten Turinabo* (Case No. MICT-13-40-R90), Decision on Deogratias Sebureze and Maximilten Turinabo's Motions on the Legal Effect of the Contempt Decision and Order Issued by the ICTR Trial Chamber, 20 March 2013, para. 12.
[218] Article 1 (2) of the Transitional Arrangements.
[219] Article 1 (3) of the Transitional Arrangements.

crucial importance. The function of trial involves all organs, including the Chambers, the Registry, the Office of the Prosecutor, and the Defence Counsel. It also involves cooperation with states in order to ensure access to witnesses and evidence.[220]

The Residual Mechanism has the competence to try any person accused by the ICTY arrested on or after 1 July 2013 and any person accused by the ICTR arrested on or after 1 July 2012.[221] The jurisdictional competence of the Residual Mechanism depends on the date by which the accused is arrested. Because the arrests of the ICTY's last remaining fugitives Goran Hadžić, arrested on 20 July 2011, and Ratko Mladić, arrested on 26 May 2011, took place more than 12 months prior to the start of the Residual Mechanism, the ICTY still has the competence to conduct and complete the trials.[222] Therefore, the President of the Residual Mechanism decided in the case of Ratko Mladić that according to Article 1 (1) of the Transitional Arrangements the ICTY has the power to complete all trial and referral proceedings pending before the ICTY. That also includes corollary interlocutory matters that arise during and are related to those proceedings, as in the case of Ratko Mladić with the disqualification of an ICTY judge.[223]

According to Article 1 (3) of the Transitional Arrangements, in the case a fugitive indicted by the Tribunals is arrested 12 months or less prior to the Commencement Date of the respective branch, the Tribunals only have the power to prepare the trial of such an individual, and the Residual Mechanism will then conduct and complete the trial of such a person. This provision was criticised in the literature, because it could risk the right of the accused person to be tried without undue delay.[224] For example, if Félicien Kabuga, a ICTR high-level accused person of the ICTR, were arrested on 2 July 2011, the ICTR would have had only the competence to hold Kabuga's initial appearance, to order any pre-trial measures, and to decide on any other preliminary matters. But Félicien Kabuga would then have had to wait until 1 July 2012 for his trial to begin.[225] This example shows the issues that could have arisen from Article 1 (3). Issues could have appeared regarding the rights of the accused based on the fairness of the proceedings and especially the right of the accused to be tried without undue delay. However, according to the Tribunals' jurisprudence and also the 'jurisprudence of international bodies on human rights the reasonableness of the period of the proceedings cannot be translated into a fixed number of

[220] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016*, UN Doc. S/2016/453, 17 May 2016, paras. 18-20. Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 120, p. 8.
[221] Resolution 1966 (2010), see note 11, preamble; Article 1 (1) of the Transitional Arrangements.
[222] *Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), covering the period from 15 May to 15 November 2011*, UN Doc. S/2011/716, 16 November 2011, paras. 10-11.
[223] *Prosecutor v. Ratko Mladić* (Case No. MICT-13-56), Decision of two Defence Motions, 20 July 2016, p. 50.
[224] Catherine Denis, 'Critical Overview of Residual Functions' of the Residual Mechanisms and its Date of Commencement (including Transitional Arrangements)' JICJ 9 (2011) 819, 820.
[225] Article (3) of the Transitional Arrangements.

days, months or years.'[226] Moreover, it has to be analysed on a case-by-case basis with respect to different aspects such as the complexity of the trial, the conduct of the accused, and the complexity of the charges, as well as the conduct of the organs of the Tribunal.[227] However, in the mentioned example the delay would not have resulted from those aspects, which would have been reasonably justified by the length of some proceedings. Moreover, the delay would have only resulted from the existence of the Residual Mechanism and the associated Commencement Dates, which were determined by the Security Council. However, the Transitional Arrangements were unavoidable in order to guarantee that the Tribunals properly end their work by the closing date, as requested by some members of the Security Council.[228] In the end, the issue did not arise as none of the high-level ICTR fugitives was arrested.

Because all ICTY fugitives were arrested, Article 1 (4) is only applicable concerning the ICTY branch in the case of an order for retrial by the Appeals Chamber. The ICTY branch of the Residual Mechanism cannot conduct any trials regarding individuals indicted for substantive crimes.[229] On 9 December 2015, the Appeals Chamber of the ICTY issued the judgment in the case of Jovica Stanišić and Franko Simatović.[230] Hence, a Trial Chamber of the Residual Mechanism at The Hague branch is seized of the case. But in the case of the ICTR, several fugitives remain at large. Therefore, it is possible that the Residual Mechanism will conduct a trial for substantive crimes. The Residual Mechanism currently has jurisdiction only over Félicien Kabuga, Augustin Bizimana, and Protais Mpiranya, because the cases of the other fugitives were referred to Rwanda.[231]

B. Appeals Proceedings

The Transitional Arrangements provide in Article 2 (1) that the Tribunals have the power to conduct all appeals 'for which the notice of appeal against the judgment or sentence is filed prior to the commencement date' of the respective branch of the Residual Mechanism, and that all other appellate proceedings will be dealt with by the Residual

[226] Ibid, p. 824; *Prosecutor v. André Rwamakuba* (Case No. ICTR-98-44C-PT), Decision on Defence Motion for Stay of Proceedings, 3 June 2005.
[227] Catherine Denis, 'Critical Overview of Residual Functions' of the Residual Mechanisms and its Date of Commencement (including Transitional Arrangements)' JICJ 9 (2011) 819, 824; *Prosecutor v. Prosper Mugiranezas* (Case No. ICTR-99-50-AR73), 27 February 2004; *Prosecutor v. Joseph Kanyabashi* (Case No. ICTR-96-15-T) 21 February 2001; *Prosecutor v. Justin Mugenzi* (Case No. ICTR-99-50-I), 8 November 2002.
[228] Catherine Denis, 'Critical Overview of Residual Functions' of the Residual Mechanisms and its Date of Commencement (including Transitional Arrangements)' JICJ 9 (2011) 819, 824; Statements by the representatives of the Russian Federation and of China, UN Doc. S/PV 6342, 18 June 2010, paras. 24-25; Statement by the representative of the Russian Federation during the adoption of Security Council Resolution 1966 (2010), UN Doc. S/PV 6463, 22 December 2010, p.3.
[229] Ibid., para. 3.
[230] *Prosecutor v. Jovica Stanišić and Franko Simatović* (Case No. IT-03-69-A), Judgement, 9 December 2015, para. 131; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016*, UN Doc. S/2016/454, 17 May 2016, paras. 11, 30.
[231] Ibid., para 45; *Progress report of the Prosecutor of the International Residual Mechanism for Criminal Tribunals, Serge Brammertz, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, Annex 2, para. 6.

Mechanism.[232] Hence, the Residual Mechanism has the power to conduct all appellate proceedings of the ICTY judgements or sentences that commence on or after 1 July 2013 as well as all appellate proceedings of the ICTR judgements that commence on or after 1 July 2012. Appeals in the cases of the three remaining fugitives of the ICTR are possible. The ICTY branch anticipates receiving appeals in the case of Ratko Mladić. In the case of Vojislav Šešelj, the Prosecution filed its notice of appeal against the Trial Judgement on 2 May 2016.[233] In the case of Radovan Karadžić, both parties filed their notices of appeal on 22 July 2016.[234] However, according to these appeals, the notice of appeal against the judgment or sentence was filed far after the Commencement Dates, so there was no doubt about the competence regarding the appeal proceedings of the Residual Mechanism.

C. Concurrent Jurisdiction between the Residual Mechanism and the Tribunals

Article 2 (2) of the Transitional Arrangements was the subject of judicial review in the case of Radovan Karadžić.[235] The Transitional Arrangements are silent about the question of whether the Tribunals and the Residual Mechanism can have jurisdiction in the same case at the same time. This was also problematic in the case of Radovan Karadžić, who requested that the Registrar of the Residual Mechanism assign a defence counsel and legal aid for appeal proceedings before the Residual Mechanism prior the issuance of the trial judgement.[236] After the Registrar denied the request, the President of the Residual Mechanism was seized of the motion for review of decision on assignment of counsel on appeal. But it was questionable whether the President of the Residual Mechanism lacked jurisdiction because, according to Article 2 (2) Transnational Agreements, the Residual Mechanism 'shall have competence to conduct, and complete, all appellate proceedings for which the notice of appeal against the judgment or sentence is filed on or after the commencement date of the respective branch of the Residual Mechanism'. However, in that case, the notice of appeal was not filed, because the trial judgement was not rendered at the time of the motion. Article 1 (1) of the Transitional Agreements provides, that the ICTY has the competence to complete all trial proceedings which are pending with it as of the date of commencement of the respective branch of the Residual Mechanism. At the time of the motion the case of Radovan Karadžić was pending before the ICTY. The

[232] Article 2 (2) of the Transitional Arrangements.
[233] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2016,* UN Doc. S/2016/975, 17 November 2016, para 37.
[234]The ICTY Trial Chamber terminated the proceedings of Goran Hadžić, following the death of the accused on 12 July 2016. *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/454, 17 May 2016, para. 15; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2016,* UN Doc. S/2016/975, 17 November 2016, para. 36.
[235] *Prosecutor v. Radovan Karadžić* (Case No. MICT-13-55), Decision on Motion for Review of Decision on Assignment of Counsel on Appeal, 4 February 2016.
[236] Ibid., para. 3.

Registrar then argued, referring to the case of Innocent Sagahutu,[237] that the ICTY and the Residual Mechanism cannot have jurisdiction in the same case at the same time.[238]

The President noted that future appeal proceedings would be conducted and completed before the Residual Mechanism. He further stated that 'procedural and collateral matters raised in direct anticipation or in necessary furtherance of instituting or advancing such appeal proceedings, including Karadzić's request for review of the Registrar's decision to deny him the assignment of counsel and legal aid on appeal, appropriately fall within the competence of the Residual Mechanism.'[239] Otherwise, Karadzić would not have any venue before which he could file a request for review of the Registrar's decision. In that case 'a lacuna in the Residual Mechanism's competence' would be opened 'that would be inconsistent with the overall scheme of the Residual Mechanism's Statute and Transitional Arrangements and with the interests of justice generally.'[240] Further, the President argued that the case of Innocent Sagahutu does not deal with the question of whether the ICTY and the Residual Mechanism can have jurisdiction over the same case at the same time. The decision in the case of Innocent Sagahutu instead clarified the appropriate procedural measures for requesting release from detention, where the Appeals Chamber of the ICTR remained seized of the case.[241]

Because the Transitional Arrangements remain silent about this question, it is not expressly prohibited for the Tribunals and the Residual Mechanism to have jurisdiction in the same case at the same time. The aim of Resolution 1966 (2010) is to transfer the functions of the Tribunals to the Residual Mechanism as soon as possible in order to allow the Tribunals to complete their work expeditiously. Uncertainties regarding jurisdiction would result in legal insecurity. In order to avoid that situation, the Transitional Arrangements refer to the Commencement Dates as the connecting factor to decide whether the Tribunals or the Residual Mechanism are competent. But in a case where it is evident that appellate proceedings will take place before the Residual Mechanism, it is reasonable that matters concerning such appeals need to fall within the competence of the Residual Mechanism. That approach would only be logical, because a decision concerning future appellate proceedings before the Residual Mechanism do affect directly the Residual Mechanism and not the Tribunals anymore. This leads to the conclusion that the Tribunals and the Residual Mechanism under certain circumstances can have jurisdiction in the same case at the same time.

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[237] *Augustin Ndindiliyimana et al. v. Prosecutor* (Case No. MICT-13-43), Decision on Innocent Sagahutu's Notice of Eligibility for Early Release and the Prosecution's Objection Thereto, 16 September 2013.
[238] *Prosecutor v. Radovan Karadžić* (Case No. MICT-13-55), see note 235, para. 9.
[239] Ibid., para. 11.
[240] Ibid.
[241] *Augustin Ndindiliyimana et al. v. Prosecutor* (Case No. MICT-13-43), see note 237, para. 3.

D. Review Proceedings, Contempt of Court and False Testimony

Article 3 and Article 4 of the Transnational Arrangements regulate competence regarding review proceedings and contempt or false testimony proceedings. The provisions are similar and provide that the Tribunals shall complete review proceedings and contempt or false testimony proceedings 'for which the request for review is filed or indictment confirmed prior to the Commencement Date of the respective branch of the Residual Mechanism'. Thus, the Residual Mechanism shall have the competence to conduct those proceedings that take on any requests for review filed or indictments confirmed on or after the Commencement Date of the respective branch of the Residual Mechanism. But Article 4 (2) of the Transitional Agreement was subject to judicial review in the cases of Radovan Karadžić,[242] Deogritias Sebureze, and Maximilien Turinabo.[243]

a. Are the Tribunals' Judicial Decisions Binding to the Residual Mechanism?

Persons who are subject to the jurisdiction of the Residual Mechanism should be treated as they would have been before the Tribunals. This provision is important in order to preserve the substantive and procedural legacy of the ICTY and ICTR. However, according to McIntyre, the Security Council did not give adequate guidance regarding the application of the substantive and procedural jurisprudence of the Tribunals by the Residual Mechanism. That is a critical point to the preservation of the Tribunals' legacies.[244] Therefore, it is questionable whether the Tribunals' judicial decisions are binding to the Residual Mechanism. McIntyre points out that a main problem could be the possibility that the Residual Mechanism could depart from the jurisdiction of the Tribunals when convicting persons. This could result in a negative impact on the rights of the accused because the Tribunals' previous decisions could be called into question. According to the Secretary-General's report, it should not be possible to call previous convictions of the Tribunals into question.[245] It is important to ensure that the validity of the Tribunals' judgements and indictments continues. According to McIntyre, the Security Council did not automatically secure the legacy of the Tribunals when creating the Residual Mechanism, because some provisions regarding the internal doctrine of precedent are missing. Instead, the Security

[242] *Prosecutor v. Radovan Karadžić* (Case No. MICT-13-55-R90.3), Decision to Invite the ICTY Trial Chamber in the Karadžić Case to Determine Whether there is 'Reason to Believe' that Contempt has been Committed by Members of the Office of the Prosecutor, 21 July 2014.

[243] *In Re. Deogratias Sebureze and Maximilten Turinabo* (Case No. MICT·13·40·R90), see note 217.

[244] Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 948.

[245] Secretary-General's Report, see note 58, para. 99. Carsten Stahn, 'Between Harmonization and Fragmentation: New Groundwork on Ad Hoc International Criminal Courts and Tribunals' LJIL 19 (2006) 567, 568; Roger Alford, 'The Proliferation of International Courts and Tribunals: International Adjudication in Ascendance' Am. Soc'y Int'l L. Proc 94 (2000) 160; Steven Freeland 'The Internationalization of Justice - A Case for the Universal Application of International Criminal Law Norms' N.Z. Y.B. Int'l L. 4 (2007) 45, 48; Karin Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions' Max Planck Y.B. U.N. L. 5 (2001) 67, 80.

Council established a situation where departures from Tribunal decisions are possible, which could lead to unfairness to those whose proceedings were transferred to the Residual Mechanism. In principle, judicial decisions are not a source of law in international law, and therefore, they do not have a binding effect as precedents. The sources of law in international law are considered to be customary law and are settled in Article 38 (1) of the Statute of the International Court of Justice, including custom, treaties, and general principles of law.[246] Hence, judges do not make law by themselves; they rather describe what the law is as dictated by the state and covered in Article 38 (1).[247] Therefore, judicial decisions are not a source of law, because the judges are not legislators.[248] Pursuant to Article 38 (1) (d) of the Statute of the International Court of Justice, Judges are 'subsidiary means for the determination of international rules of law' and are therefore only an evidence of the law but not the law as such.[249] Hence, it was not possible for the Security Council to confer the status of binding authority upon the Tribunals' judicial decisions for the Residual Mechanism, because this would have been contrary to Article 38 (1) and would result in the impression that the judges of the ICTY and ICTR have been elevated to legislators.[250] Furthermore, the Tribunals also treat each other's decisions as persuasive but not as binding authority. However, the common Appeals Chamber ensures the consistency between the ICTY and the ICTR and that decisions are binding. [251]

There is no hierarchy in international law between different international judicial entities. According to McIntyre, international Tribunals are equals, and therefore they are not obligated 'to take account of either their own previous decisions or those of other judicial bodies, even if they relate to the same subject matter.' [252] Hence, it does not correspond to the 'current understanding of the relationship between international courts and tribunals to bind the Residual Mechanism to the previous decisions of the Tribunals.'[253] That approach could result in a situation where the Residual Mechanism is bound to the decisions of the Tribunals, which no longer exist. In addition, the Security

[246] According to Article 38 (1) of the Statute of the International Court of Justice: 'The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law'.

[247] Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 950; Antonio Cassese, *International Criminal Law: Cases and Commentary* (Oxford University Press, Oxford 2011), pp. 5-27.

[248] Robert Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of International Criminal Tribunals on the ICRC Customary Law Study' J. Conflict & Sec. L. 11 (2006) 239, 245-247; Gilbert Guillaume, 'The Use of Precedent by International Judges and Arbitrators' J Int Disp Settlement 2 (2011) 5, 8-9; Karin Oellers-Frahm, 'Multiplication of International Courts and Tribunals and Conflicting Jurisdiction – Problems and Possible Solutions' Max Planck Y.B. U.N. L. 5 (2001) 67, 72.

[249] *Prosecutor v. Kupreskić et al.* (Case No. IT-95-16-T), Judgment, 14 January 2000, para. 540.

[250] Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 948.

[251] *Prosecutor v. Kanyabashi,* Decision on the Defence Motion on Jurisdiction, Case No. ICTR-96-15-T, 18 June 1997, para. 8.

[252] *Prosecutor v. Joseph Kupreskic et al.* (Case No. IT-95-16-T), Judgment, 14 January 2000, para. 540.

[253] Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 948.

Council would interfere in judicial discretion when including a directive to the judges of the Residual Mechanism that would bind the judges to previous decisions issued by the Tribunals.

Traditionally common law jurisdictions have recognised the principle of stare decisis, or binding precedent, by which courts are bound by their previous decisions.[254] Thus, the use of precedents manly exists in common law systems but also occurs in civil law systems. Although the civil law jurisdictions do not recognise the principle of binding precedent, as a matter of practice their highest courts will generally follow their previous decisions.[255] However, the principle of stare decisis, or binding precedent, is not a general principle of law. International humanitarian law is part of customary law and can be applied by the international tribunals. But the report of the Secretary-General does not mention precedent as a source of law. While the doctrine of precedent does not operate as a matter of general practice and practical necessity in the ECHR, the Commission regards the court's binding judgments as the final authority on the interpretation of the Convention.[256] For instance, in the Cossey Case[257] the court stated that, even if it were not strictly bound to its previous judgements, it would usually follow its previous decisions if there were in the interests of legal certainty.

In international law the lack of precedent and the horizontal link between international courts are basic principles. Courts dealing with inter-state legal disputes have primarily developed these principles. In contrast, the Tribunals and the Residual Mechanism are Chapter VII measures that have the objective of prosecuting persons responsible for serious violations of international humanitarian law.[258] The Tribunals' proceedings have normative force and are binding for all states.[259] There is no provision in the ICTY Statute that deals expressly with the question of the binding force of decisions of the ICTY. But the lack of such a provision does not mean in general that the ICTY Statute does not resolve the issue. The aim of the ICTY is to prosecute persons who are responsible for serious violations of international humanitarian law.[260] Especially as they are criminal courts, particularly important values of the Tribunals include fairness, certainty, and predictability where the liberty of the individual is implicated. Therefore, diverging from basic international law the Appeals Chamber of the ICTY decided to create

[254] UK, USA, Australia.
[255] France, Italy, Germany.
[256] Karen Reid, *A Practitioner's Guide to the European Convention on Human Rights* (4th edn, Sweet & Maxwell, London 2011), p. 43.
[257] Case of Cossey v. The United Kindgom, Series A, No. 184, 27 September 1990.
[258] Article 1 of the ICTY Statute.
[259] Enzo Cannizzaro, 'Interconnecting International Jurisdictions: A Contribution from the Genocide Decision of the ICJ' Eur. J. Legal Stud. 1 (2007) 42, 55; Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 952.
[260] Article 1 of the ICTY Statute.

an internal doctrine of precedent at the Tribunal due to these important values.[261] In this sense, the Appeals Chamber of the ICTY noted in the Aleksovski judgment that the ICTY Statute, 'taking account of its text and purpose, yields the conclusion that in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interest of justice.'[262] The Appeals Chamber noted that the right of appeal, which is an important principle of customary international law, 'gives rise to the right of the accused to have like cases treated alike'. Therefore, the Appeals Chamber should follow its previous decisions in order to ensure a fair trial, but has to be able at the same time 'to depart from them for cogent reasons in the interest of justice.' [263] On the contrary, in the case of Laurent Semanza, Judge Shahabuddeen expressed a different viewpoint where he questioned the legal status of the Aleksovski judgment, observing that the Tribunals' Statute does not expressly mention an obligation of the Appeals Chamber to follow its previous decisions.[264] However, after years of judicial practice of the Tribunals, the applicable procedures and law are a substantial ground for the Tribunals' judgments and decisions.

As an aspect of the principle of law as well as the right of the accused to a fair trial, the certainty and predictability of the law is very important. This principle is based on the idea that law needs to be knowable and foreseeable for the accused individual. It is necessary that the accused can expect that the case will be treated the same as similar cases in the past. Hence, the Appeals Chamber in the Aleksovski judgement argued that a part of the fair trial principle is the right of an accused individual to have like cases treated alike. They argue that similar cases have to be treated in the same way and decided if possible with the same reasoning.[265]

According to McIntyre, the Security Council followed the approach of the ICTY Appeals Chamber in the Aleksovski judgement and created a doctrine of precedent for the Residual Mechanism concerning applicable previous decisions of the ICTY and ICTR while allowing departures from it for cogent reasons in the interests of justice. McIntyre argues that the Security Council should have the competence to create such doctrine acting under Chapter VII. Other international and hybrid courts, like the ICC, the SCSL, and the Extraordinary Chambers of the Courts of Cambodia have adopted a doctrine of precedent.[266] These courts and tribunals rely on the previous decisions and see them as

[261] Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 952.
[262] *Prosecutor v. Zlato Aleksovski (*Case No. IT-95-14/1-A), Judgment, 24 March 2000, para.107.
[263] Ibid., para. 113.
[264] *Prosecutor v. Laurent Semanza* (Case No. ICTR-97-20-T), 15 May 2003.
[265] *Prosecutor v. Zlato Aleksovski (*Case No. IT-95-14/1-A), see note 262, para. 105.
[266] *Prosecutor v. Brimba et al.* (Case No. SCSL-04-16-PT), Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 2004, paras. 21-24.

correctly stating the law. According to Article 20 (3) of the SCSL Statute, the ICTR and the ICTY Appeals Chamber's decisions guide the judges.[267] This also applies to the relationship between the Tribunals.

But it could also be argued that the Security Council did not consider it necessary to implement a regulation within the IRMCT Statute binding the Residual Mechanism to the previous jurisprudence of the ICTY and the ICTR. Properly interpreting the Statute requires the Residual Mechanism to consider itself bound. In the case the Residual Mechanism interprets its Statute in the same way the Tribunals interpreted their Statutes, that is, according to the rules for interpreting treaties explained in Articles 31-33 of the 1969 Vienna Convention on the Law of Treaties, the Residual Mechanism has to consider itself as bound to the Tribunals' previous decisions.[268] The IRMCT Statute, including the text and purpose, makes clear that the Residual Mechanism completes the Tribunals' work and continues the residual functions.[269] The Residual Mechanism is the legal successor to the ICTY and ICTR, which is residual in nature and has the purpose of finishing the Tribunals' work. However, the Residual Mechanism is a scaled-down version of the Tribunals, whose Statute and Rules of Procedure and Evidence are based on the Tribunals' Statutes and Rules of Procedure and Evidence. Therefore, the Security Council's statement was meant to guarantee that the Residual Mechanism respects the rights of accused, meaning like cases have to be treated alike. In the case of Phineas Munyarugarama, the Appeals Chamber pointed out that the Residual Mechanism is bound to interpret the IRMCT Statute and the IMRCT RPE in a manner consistent with the jurisprudence of the Tribunals, because the Residual Mechanism's mandate is to continue the Tribunals' work.[270] Otherwise the completion by the Residual Mechanism could take on a completely different character.

b. Are Decisions and Orders Legally Binding for the Residual Mechanism when taken by the Tribunals after the Commencement Date?

In the case of Deogritias Sebureze and Maximilien Turinabo, the question appeared as to whether the contempt decision and order issued by the ICTR Trial Chamber was legally binding for the Residual Mechanism when taken after the Commencement Date of the branch.[271] Article 4 (2) states: 'The Residual Mechanism shall have competence to conduct, and complete, all proceedings for contempt of court and false testimony for which

[267] Ibid.
[268] Vienna Convention on the Law of Treaties, 23 May 1969, U.N.T.S, 1155, 331.
[269] *Prosecutor v. Zlato Aleksovski (*Case No. IT-95-14/1-A), see note 262, para. 107.
[270] *Augustin Ngirabatware v. Prosecutor* (Case No. MICT-12-29-A), see note 106, para 4-6.
[271] Ibid.

the indictment is confirmed on or after the commencement date of the respective branch of the Residual Mechanism.' Further, Articles 1 (2) and (3) of the IRMCT Statute refer to the 'power to prosecute, in accordance with the provisions of the present Statute, the persons indicted by the ICTR and ICTY' for substantive crimes. However, Article 1 (4) of the IRMCT Statute does not apply the language 'persons indicted by the ICTY or ICTR'. Article 1 (4) refers to the ability of the Residual Mechanism to prosecute persons for contempt and false testimony concerning the Residual Mechanism or the Tribunals. According to the Single Judge, the wording in Article 1 of the IRMCT Statute supports the view that Article 4 (2) of the Transitional Arrangements must be understood in this way, and that the exclusive power to decide whether to indict ICTR contempt cases was transferred to the Residual Mechanism for cases where the indictment was not confirmed before 1 July 2012. This leads to the conclusion that the Residual Mechanism has the exclusive power to determine whether to indict persons suspected of contempt or false testimony before the Tribunals or the Residual Mechanism after the Commencement Date of the branch.[272] The Residual Mechanism would be competent even in the instance that the Trial Chamber of the Tribunal was seized of the matter before the Commencement Date of the branch.

The decision in the case of Pauline Nyiramasuhuko[273] stated that a Trial Chamber remains competent after the judgement has been pronounced regarding 'ancillary matters of which it is properly seized and that issues relating to possible contempt are independent of the proceedings out of which they arise'.[274] But this ruling was inapposite in the case of Deogritias Sebureze and Maximilien Turinabo because it does not address the transitional issue, which is a result of the Resolution 1966 (2010) transferring competence from the Tribunals to the Residual Mechanism.[275] In the case of Deogritias Sebureze and Maximilien Turinabo, the ICTR Trial Chamber decided pursuant to Rule 77 (C) of the ICTR RPE that there was reason to believe that a person might be in contempt of the Tribunal and directed that an amicus curiae be appointed to investigate the matter and report back to the Chamber as to whether there were sufficient grounds to instigate contempt proceedings. The steps taken are equivalent to the steps to be taken pursuant to Rule 90 (C) of the IRMCT RPE. Although the amicus curiae filed his report on 29 November 2010, the steps taken in line with Rule 77 (D) of the ICTR RPE, namely the decision to order prosecution for contempt and issuance of an order in lieu of an indictment

[272] Ibid., para. 9.
[273] *Prosecutor v. Pauline Nyiramasuhuko et al.* (Case No. ICTR-98-42-A), Decision on Pauline Nyiramasuhuko's Motion to Void Trial Chamber Decisions (AC), 30 September 2011.
[274] *In Re. Deogratias Sebureze and Maximilten Turinabo* (Case No. MICT·13·40·R90), see note 217, para. 10.
[275] Ibid.

by the ICTR Trial Chamber, were taken long after 1 July 2012. If the ICTR Trial Chamber did take the step while properly seized of the matter the decision would have retained its validity in relation to Rule 90 (C) of the IRMCT RPE. According to the Single Judge, as a result of Article 4 (2) of the IRMCT Statute and the general spirit of the Transitional Arrangements, it can only be the responsibility of the Residual Mechanism to complete the contempt proceedings. Because in the case of Deogritias Sebureze and Maximilien Turinabo the ICTR Trial Chamber took the steps after the Commencement Date of the ICTR, the decision of the Trial Chamber has no legal effect before the Residual Mechanism. [276] There followed a motion by the ICTR Prosecutor for reconsideration of the Single Judge's decision in the case of Deogritias Sebureze and Maximilien Turinabo.[277] The Prosecutor argued that the interpretation of the relevant provisions established in the Single Judge's decision would lead to an abrupt cut-off of still pending ICTR proceedings. In addition, it would duplicate the work already done at the ICTR, if the Residual Mechanism had to familiarise itself with the record, review the amicus curiae report, and deliberate on the decision.[278] The interpretation of the Single Judge would hinder a smooth transition of jurisdiction. The cut-off of ICTR contempt jurisdiction as of 1 July 2012 would lead to absurd results where the underlying trial goes beyond the Commencement Date. Further, the Prosecutor pointed out that proceedings regarding contempt are 'ancillary to the underlying criminal matter and can proceed on a separate track from the merits judgement.' The Single Judge responded by pointing out that the ICTR Trial Chamber had sufficient time to take steps in line with Rule 77 (D) of the ICTR RPE before the Commencement Date. Therefore, the abrupt cut-off and the duplication of work is not the result of the Transitional Arrangements. Moreover, this is due to the fact that the ICTR Trial Chamber did not indict before 1 July 2012, but instead chose to wait. That approach resulted in leaving further proceedings to the Residual Mechanism.[279] Further, the Security Council intended a smooth transition to the Residual Mechanism by adopting Resolution 1966 (2010), IRMCT Statute, and the Transitional Arrangements more than 18 months before the Commencement Date and by providing clear-cut and specific directives in the Transitional Arrangements on the transfer of obligations. This led to the conclusion that the Security Council did not leave the decision when and how to transfer matters to the Residual Mechanism to the discretion of the Tribunals.[280] Article 4 (2) explicitly provides

[276] Ibid., para. 12.
[277] Ibid.
[278] IIbid., para. 26.
[279] Ibid., para. 28.
[280] Ibid., para. 38.

that the Tribunals will only complete the contempt proceedings if the indictment was issued before the Commencement Date. This would not lead to absurd results.[281]

But the problem appeared of whether the ICTR Trial Chamber unquestionably has the inherent competence to start contempt proceedings, as this power is determined in the ICTR RPE since contempt is an inherent competence of every court.[282] The ICTR Prosecutor argued, referring to Resolution 1966 (2010), the IRMCT Statute, and the Transitional Arrangements, that the Security Council did not intend to divest the Tribunals of their inherent competence to initiate contempt proceedings only because the contempt order was issued after 1 July 2012. However, the Single Judge agreed that it was necessary in a judicial system to penalise contempt and that the court seized of the underlying matter can take steps concerning further proceedings. But when adopting the Tribunals' Rules of Procedure and Evidence on contempt proceedings, the Tribunals' judges relied on inherent competence because the Statutes did not regulate the matter, not because it was a prerogative for judges to regulate contempt proceedings. The Single Judge concluded this from the Security Council's inclusion of contempt in Article 1 (4) of the IRMCT Statute and Article 4 (2) of the Transitional Arrangements. Furthermore, the Single Judge argued that it is not an 'inherent component of contempt proceedings that the bench seized with the underlying matter decides whether to indict.'[283] The Tribunals' judges adopted that approach, but the judges of the Residual Mechanism have adopted another solution, namely that the bench seized with the underlying matter only decides whether there is reason to believe that a person may be in contempt and, if so, refers the matter to the President, who in turn assigns a Single Judge to deal with the matter, thereby avoiding the potential that the matter of contempt could prejudice the proceedings in the underlying matter.[284]

The ICTR Prosecutor argued that the lack of reference to persons indicted by the Tribunals in Article 1 (4) of the IRMCT Statute shows that contempt proceedings are not initiated by an indictment, but can be initiated by an order in lieu of an indictment, which was done by the ICTR. Further, the Prosecutor explained that the use of the term 'complete' in Article 4 (2) of the Transitional Arrangements indicates that the ICTR Trial Chamber retained its power to indict beyond the Commencement Date so that the matter which will be completed by the Residual Mechanism would also be on trial before the ICTR. However, the Single Judge replied that an order in lieu of an indictment usually includes a judicial indictment. Furthermore, the Rules of Procedure and Evidence

[281] Ibid., paras. 47-49.
[282] Ibid., para. 29.
[283] Ibid., para. 31.
[284] Ibid.

regarding indictments issued by the Office of the Prosecutor apply to orders in lieu of indictment mutatis mutandis, according to Rule 90 (E) of the IRMCT RPE. Therefore, the Transitional Arrangements do cover judicial indictments.[285]

Article 4 (2) provides that the ICTR will complete the contempt proceedings, if the indictment was issued before 1 July 2012, provided the trial has started before that date. Conversely, the Residual Mechanism has the competence to indict on or after 1 July 2012.[286] Concerning this matter, the Transitional Arrangements provide an explicit date when the Tribunals' jurisdiction ends and the jurisdiction of the Residual Mechanism begins. Uncertainties regarding jurisdiction would result in legal insecurity. Therefore, it is only consistent that decisions after the Commencement Date in such matters do not have a legal effect on the Residual Mechanism.

c. Power to Conduct and Complete Contempt Cases

Article 4 (2) of the Transitional Arrangements provides that the Residual Mechanism has the power to conduct and complete contempt cases where no indictment was confirmed before the Commencement Date of the respective branch. The case of Radovan Karadžić addressed the problem of whether the initial 'reason to believe' determination under Rule 90 (C) of the IRMCT RPE would fall under the 'conduct and complete' provision referenced in the Transitional Arrangements.[287] Where a contempt matter arises before the Tribunal on or after the Commencement Date, the trial or appeals chamber seized with the underlying matter is the chamber that according to Rule 90 (C) of the IRMCT RPE has the authority to determine whether there is reason to believe that a person may be in contempt and shall refer the matter to the President of the Residual Mechanism. Therefore, the Single Judge decided that because the ICTY Trial Chamber is seized of the underlying matter and the committed contempt is closely linked to the proceedings before the Trial Chamber, it has the competence to make the 'reason to believe' determination. Referring to the ruling on the ICTR Prosecutor's Motion for Reconsideration of the Sebureze and Turinabo Decision, he noted 'where a contempt matter arises before the ICTR (or ICTY) it will, on or after 1 July 2012 (or on or after 1 July 2013) be the ICTR (or ICTY) trial or appeal chamber seized with the underlying matter which is the '[c]hamber" that pursuant to MICT Rule 90 (C) has the authority to determine whether there is reason to believe that a person may be in contempt, and shall refer the matter to the MICT President for the

[285] Ibid., paras. 41-42.
[286] Ibid., paras. 45- 46.
[287] *Prosecutor v. Radovan Karadžić* (MICT-13-55-R90.3), see note 242.

appointment of a Single Judge to deal with the further proceedings'. [288] The Single Judge stated that ICTY or ICTR Trial or Appeals Chamber seized with a case beyond the Commencement Date of the relevant branch of the Residual Mechanism retains jurisdiction to make the 'reason to believe' determination under Rule 90 (C) of the IRMCT RPE in matters which are closely linked to the on-going trial or appeals proceedings.[289]

Further, according to Rule 90 (A) of the IRMCT RPE and Rule 77 (A) of the ICTY and ICTR RPE, the judges have inherent power to control contempt proceedings. In order to be able to effectively control the trial or appeals proceedings and to ensure their integrity, a Chamber or Single Judge has the competence to initiate contempt proceedings in matters linked to those proceedings. However, it would be untenable if the competence to initiate contempt proceedings, which is considered an inherent power under the Rules of the ICTY, the ICTR, and the Residual Mechanism, only applied to cases where the 'reason to believe' determinations were made prior to the Commencement Date of the respective branch of the Residual Mechanism or when the underlying case is before the Residual Mechanism.'[290] The Security Council did not have any intention to reduce the power of the Tribunals' Chambers and to control their proceedings through the Transitional Arrangements or the IRMCT Statute. Moreover, the Transitional Arrangements and the IRMCT Statute provide that the judges have to be in control of contempt proceedings. Further, Resolution 1966 (2010) notes that the IRMCT RPE has to be based on the ICTY RPE and ICTR RPE. Therefore, the Single Judge argued that the language 'conduct and complete' as used in Article 4 (2) of the Transitional Arrangements cannot be interpreted to include the initial determination as to whether there is 'reason to believe' that a person has committed contempt. However, this reasoning is comprehensible because the 'reason to believe' determination is closely linked to the proceedings. Therefore, it would be most efficient if the Trial Chamber conducts the 'reason to believe' determination, which is seized with the underlying matter in the first place. A different Chamber would first need to familiarise with the proceedings in order to be able to conduct the determination, what would take even more time. This decision, however, differs from the findings in the case of Deogritias Sebureze and Maximilien Turinabo, because the 'reason to believe' determination is only an examination of facts. But deciding whether to indict a contempt case would be a completely new legal step that needs to be taken by the Residual Mechanism after the Commencement Date.

[288] Ibid., para. 12.
[289] Ibid., para. 13.
[290] Ibid., para. 15.

E. Protection of Victims and Witnesses

The Tribunals provide protection and related judicial or prosecutorial functions regarding all victims and witnesses concerning proceedings within the jurisdiction of the Tribunals, according to Articles 1 through 4 of the Transnational Arrangement. And the Residual Mechanism does the same for all proceedings for which the Residual Mechanism has competence.[291] Because the ICTR completed all work in December 2015, this provision does not apply for the ICTR branch. The function of protecting witnesses in completed cases was transferred to the Residual Mechanism.[292] In the case of Stansilav Galić, the Single Judge decided, referring to Articles 1 (1) and 5 (1) of the Transitional Arrangements, that he lacked jurisdiction over an application for access under Rule 86 (G) (i) of the IRMCT RPE. Stansilav Galić filed an application for access to confidential inter partes material in the case of Ratko Mladić, which was pending before the ICTY.[293] Rule 86 (G) (i) of the IRMCT RPE provides that a party to the second proceedings seeking to rescind, vary, or augment protective measures ordered in the first proceedings has to apply to the Chamber seized of the first proceedings.[294]

Pursuant to Article 5 (3) of the Transnational Arrangement, the Residual Mechanism has to provide for the protection of witnesses and victims and carry out all related judicial or prosecutorial functions where a person is a witness or victim concerning two or more cases for which the Residual Mechanism and the Tribunals have competence. The aim of the Transitional Arrangements to ensure a smooth transition of the main functions from the Tribunals to the Residual Mechanism is determined expressly in Articles 5 (4) and Article 6 of the Transnational Arrangements. Article 5 (4) provides that the Tribunals have to make the necessary arrangements to ensure as soon as possible a coordinated transition of the witness and victim's protection function to the Residual Mechanism regarding all completed cases of the Tribunals. A smooth transfer is especially necessary concerning the protection of victims and witnesses, because the safety of victims and witnesses depends on a functioning protection.

F. Coordinated Transition of other Functions

As of the Commencement Date of each branch, the Residual Mechanism continues all related judicial or prosecutorial functions concerning cases. Regarding other functions of the Tribunals, the ICTY and ICTR respectively have to make the necessary arrangements

[291] Article 5 (2) of the Transitional Arrangements.
[292] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/454, 17 May 2016, para. 29.
[293] *Prosecutor v. Stanislav Galić* (Case No. IT-09-92-T), Decision on Motion By Stanislav Galić For Confidential Material in the Mladić Case, 20 July 2016.
[294] *Prosecutor v. Stanislav Galić* (Case No MICT-14-83), Decision on Application for Access, 9 May 2016, para. 37.

to guarantee a smooth transition to the Residual Mechanism, 'including the supervision of enforcement of sentences, assistance requests by national authorities, and the management of records and archives.' Consequently, as of the Commencement Date, the Residual Mechanism continues all related prosecutorial and judicial functions.[295]

G. Transitional Arrangements for the President, Judges, Prosecutor, Registrar and Staff

Article 7 of the Transitional Arrangements enables the President, Judges, Prosecutor and Registrar of the Residual Mechanism to hold the same office in the Tribunals and the Residual Mechanism. The staff members of the Residual Mechanism can also be staff members of the Tribunals. This provision ensures maximum efficiency, because the Residual Mechanism benefits from the Tribunals' experienced staff. In addition, the workload of the Tribunals will decrease so it would be cost reducing to use staff for the Tribunals and the Residual Mechanism simultaneously.

4. Rules of Procedure and Evidence

The aim of the Residual Mechanism is to secure the legacy of the ICTY and the ICTR. Therefore, the Security Council requested the Residual Mechanism that apply the same modus operandi as the Tribunals. The Secretary-General was asked to submit a draft of the Rules of Procedure and Evidence for the Residual Mechanism that needed to be based on the Tribunals' Rules of Procedure and Evidence.[296] Further, Article 13 (1), (3) of the IRMCT Statute and Rule 1 of the IRMCT RPE provide that the judges of the Residual Mechanism have to adopt the Rules of Procedure and Evidence and that the 'Rules of Procedure and Evidence and any amendments thereto shall take effect upon adoption by the judges of the Residual Mechanism unless the Security Council decides otherwise'.[297] The IRMCT RPE were adopted and entered into force on 8 June 2012.[298]

According to McIntyre, Article 13 (3) of the IRMCT Statute is noteworthy because it could be on the one hand an approach of the Security Council to guarantee that the Residual Mechanism adopts procedures similar to those of the Tribunals in order to prevent 'a judicial revolution of the Rules of Procedure and Evidence'.[299] But on the other hand, it could also be an expression of the Security Council's mistrust regarding the judges

[295] Article 6 of the Transitional Arrangements.
[296] UN Security Council Resolution 1966 (2010), see note 11, para 5.
[297] Rule 6 (B) of the IRMCT RPE: 'Amendments of the Rules'.
[298] UN Residual Mechanism for International Criminal Tribunals 'Rules of Procedure and Evidence' UN Doc. MICT/1, 8. June 2012.
[299] Gabrielle McIntyre, 'The International Residual Mechanism and the Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' GoJIL (2011) 923, 947.

of the Residual Mechanism.[300] The Security Council is able to veto amendments to the Rules of Procedure and Evidence made by the judges of the Residual Mechanism. Therefore, the Security Council is able to influence the conduct of the proceedings. The veto of the Security Council would most likely concern those amendments in particular that could lengthen proceedings.[301] According to McIntyre, this involvement of the Security Council is not acceptable because it is not appropriate for the Security Council to interfere in any judicial proceeding of the Residual Mechanism, just as it would have been inappropriate for the Security Council to attempt to interfere in any proceeding of the ICTY or ICTR.[302] Therefore, McIntyre assumes that Article 13 (3) of the IRMCT Statute will never be utilised, but 'that said, the fact that the Security Council considered it appropriate for reasons of political expediency to close the Tribunals suggests that in fact, direct interference in the Residual Mechanisms rules of procedure and evidence may be a possibility.'[303]

Amendments to the IRMCT RPE will be adopted if circulated to all judges and agreed to in writing by not less than thirteen judges or by a majority of the judges present at a plenary meeting convened by the President.[304] This provision is derived from Rule 6 (A), (B) of the ICTR RPE because according to the ICTR RPE the amendment will be adopted if agreed upon by not less than a majority of all judges at a plenary meeting or it is approved by at least two-thirds of all judges confirmed in writing, whereas according to the ICTY RPE amendments were adopted if agreed upon by not less than ten permanent judges at a plenary meeting or if unanimously approved by the permanent judges.[305]

Article 13 (4) of the IRMCT Statute provides that the IRMCT RPE have to be in accordance with the IRMCT Statute, whereas that provision is not found in the Statutes of the ICTY or ICTR. Article 13 (4) of the IRMCT Statute again is a provision that shows the Security Council's intent to ensure that the procedure of the Residual Mechanism will be the same as the Tribunals' procedures. Thereby, the continuity between the work of the Residual Mechanism and the Tribunals could be ensured and the Tribunals' legacies preserved. Furthermore, according to Rule 24 (A) of the IRMCT Statute, the Security Council appoints the President of the Residual Mechanism, while under Tribunals' provisions the judges at a plenary meeting elected the Tribunals' Presidents.[306] Therefore, the provisions regarding the election of the Presidents were changed in the IRMCT

[300] Ibid.
[301] Ibid.
[302] Ibid.
[303] Ibid.
[304] Rule 6 (A) of the IRMCT RPE.
[305] Rule 6 (A), (B) of the ICTY RPE.
[306] Rule 24 (i) of the ICTY RPE, Rule 24 (i) of the ICTR RPE.

Statute.[307] This ensures a greater involvement of the Security Council regarding the work of the Residual Mechanism.

The IRMCT RPE include provisions copied from the Tribunals' Rules of Procedure and Evidence, [308] but also some completely new regulations.[309] For example, the functions of the Registrar are specified further in Rule 31 (A) (i)-(iii) of the IRMCT RPE. The Registrar directs and administers the Chambers' Legal Support Section, takes all necessary measures so the decisions made by the Chambers and judges are executed, and makes recommendations concerning the missions of the Registry that affect the judicial work of the Residual Mechanism. Rule 49 (C) of the IRMCT RPE regarding the joinder of crimes and trials is a new provision and provides a definition for the term transaction and states that 'a transaction for the purpose of this Rule is to be understood as a number of acts or omissions whether occurring as one event or a number of events, at the same or different locations and being part of a common scheme, strategy, or plan'. Rule 146 (B) is a new provision and regulates the request for review and provides that the President composes a bench with the same number of judges as the original bench to decide the motion. To the extent possible, the judges who were part of the original Chamber shall be appointed. Rule 32 (B) of the IRMCT RPE provides for an adoption of a gender-sensitive approach to support victims and witnesses, while the ICTY RPE and ICTR RPE suggest hiring women in support units for victims and witnesses. The IRMCT RPE is divided in eleven parts, in contrast to the ICTY RPE and ICTR RPE, which are divided in ten parts and nine parts, respectively.

A. Disclosing Confidential Information

Part eleven of the IRMCT RPE includes a new regulation regarding declassification of non-public records of proceedings and evidence.[310] The Tribunals' regulations regarding that matter were laid down in directives.[311] According to Rule 155 (A) and (B) of the IRMCT RPE, after a case has been closed the President may assign a Single Judge to review the records of proceedings and evidence for the purpose of considering whether disclosure of all part of the records or evidence should be determined. However, when applying this Rule, the Single Judge shall have due regard for the protection of victims and

[307] See Rule 26 (A) of the IRMCT RPE, 24 (i) of the ICTY RPE, 24 (i) of the ICTR RPE.
[308] Rule 4, Rule 5, Rule 7, Rule 9, Rule 12, Rule 13, Rule 15, Rule 16, Rule 20- 23, Rule 29, Rule 30, Rules 33-34, Rules 37- 41, Rules 44- 46, Rule 52, Rule 54, Rule 55, Rule 58, Rule 60-62, Rule 66, Rule 67, Rule 71, Rule 73, Rule 74, Rule 76, Rules 80-83, Rule 89, Rule 92, Rule 96, Rule 97, Rules 99-107, Rules109-115, Rules 117- 124, Rule 126, Rule 127, Rules 129-131, Rule 133, Rules 134-141, Rule 143, Rule 145, Rules 147-151, Rule 154 of the IRMCT RPE.
[309] Rule 3 (G) Rule 10, Rule 17 (C), Rule 19 (G), Rule 27 (C), Rule 43 (G) 49 (C), Rule 84 (B), Rule 85, Rule 86 (J), Rule 87, Rule 88, Rule 98 (iii), (iv), Rule 132, Rule 146 (B), Rule 155 of the IRMCT RPE.
[310] Rule 155 of the IRMCT RPE.
[311] Secretary-General's bulletin *International Criminal Tribunals: information sensitivity, classification, handling, and access,* UN Doc. ST/SGB/2012/3, 20 July 2012; Secretary-General's bulletin, Section 1 (a), UN Doc. ST/SGB/2007/5, 12 February 2007.

witnesses.[312] According to Rule 155 (G) of the IRMCT RPE, a party or third party affected by the decision is allowed, within four months of the date of filing of the decision, to file a request for review. Paragraph (H) regulates that the Registrar is responsible for the implementation of any order for the declassification of records.

The access to material containing confidential information of witnesses was subject to some proceedings before the Residual Mechanism. Pursuant to Rule 86 (F) (i) of the IRMCT RPE, protective measures ordered in proceedings before the Tribunals continue to have effect in proceedings before the Residual Mechanism unless and until they are rescinded, varied or augmented.[313] Because the IRMCT RPE are based on the ICTY and ICTR RPE, the standards developed in the ICTR and ICTY jurisprudence for allowing access to confidential information apply to Rule 86 of the IRMCT RPE as well. However, IRMCT RPE require the consent of the concerned protected witness for the variation of protective measures, like access to confidential information for use in proceedings. According to Rule 86 (I) of the IRMCT RPE, the Victims and Witness Section needs to ensure that the protected victim or witness has consented to the rescission, variation, or augmentation of protective measures. But where exigent circumstances appear or where a miscarriage of justice would otherwise result, the Chamber may order proprio motu the rescission, variation, or augmentation of protective measures in the absence of such consent, pursuant to Rule 86 (I) of the IRMCT RPE.[314] The Residual Mechanism has to find a balance between the right of a party to have access to material in order to be able to prepare its case and the need to ensure the protection of witnesses and victims.[315] The protection of witnesses and victims is very important for the proper functioning of the Residual Mechanism.

Rule 10 of the IRMCT RPE is a new provision and regulates information of the International Committee of the Red Cross (ICRC) and provides that it is not obligated to disclose any information, including documents or other evidence, concerning the performance of its mandate. Nor can 'such information acquired by a third party on a

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[312] Rule 155 (E) (i) of the IRMCT RPE.

[313] *Prosecutor v. Jean Paul Akayesu* (Case No. MICT-13-30), see note 149, p. 542; *Prosecutor v. Jean Paul Akayesu* (Case No. MICT-13-30), Decision on a Motion for Access to Confidential and Ex Parte Filings, 10 Juni 2016, p. 552; *Prosecutor v. Paul Bagilishema* (Case No. MICT-12-07), 'Decision in Respect to Jacques Munungwarere's Motions to Access Materials', 18 Janaury 2013, para. 8. *Prosecutor v. Radoslav Brdanin* (Case No. IT-99-36-A), Decision on Mico Stanisic's Motion for Access to All Confidential Materials in the Brdanin Case', 24 January 2007, para. 10; *Prosecutor v. Nikola Sainovir et al.* (Case No. IT-05-87-A), 'Decision on Vlastimir Dordevic's Motion for Access to Transcripts, Exhibits and Documents', 16 February 2010, para. 19; *Prosecutor v. Vujadin Popovic et al.,* (Case Nos. IT-05-88-A & IT-09-92-T), Decision on Motion by Ratko Mladic for Access to Confidential Material, 20 February 2013, p. 2; *Tharcisse Muvunyi v. The Prosecutor*, (Case No. ICTR-2000-55A-A), 'Decision on Ildephonse Nizeyimana's Request for Access to Closed Session Transcripts', 31 March 2011, para. 3; *Eliezer Niyitegeka v, Prosecutor* (Case No. WCT-12-16), 'Decision of Niyitegeka's Urgent Request for Orders Relating to Prosecution Witnesses', 29 January 2016, para. 8; *Prosecutor v. Jean de Dieu Kamuhanda* (Case No. MICT-13-33-R86.2), 'Second Decision on Motion for Access to Confidential Material from the Nshogoza Case, 9 November 2015, para. 4; *Prosecutor v. Radovan Karadžić* (MICT-13-55-R90.3), Decision on Motion for Access to Ex Parte Filings in Completed Cases, 10 May 2016.

[314] *In Re. Ntakirutimana et al.* (Case No. MICT -12-11), Decision in Respect to Jacques Mungwarere's Motion to Access Materials, 18 January 2013, paras . 7, 8.

[315] *Prosecutor v. Jean Paul Akayesu* (Case No. MICT-13-30), see note 149, p. 552.

confidential basis from the ICRC or by anyone while in the service of the ICRC be subject to disclosure or to witness testimony without the consent of the ICRC.' However, in the case Šimić et al. the ICTY acknowledged this particular right of the ICRC. [316] Because the Residual Mechanism is obliged to continue the Tribunals' jurisprudence, it could be argued that Rule 10 of the IRMCT RPE is superfluous.

B. Legal Standing of Tribunals' Parties before the Residual Mechanism and Vice Versa

In the case of Deogritias Sebureze and Maximilien Turinabo the question appeared of whether the ICTR Prosecutor is a party to contempt proceedings of the Residual Mechanism so that he could have standing to move for reconsideration of a decision. Rule 2 of the IRMCT RPE provides that unless the context otherwise requires it: '[p]arty' shall mean '[t]he Prosecutor or the Defence' and '[p]rosecutor' shall mean '[t]he Prosecutor appointed pursuant to Article 14 of the [MICT] Statute'. Thus, the defence and the Prosecutor of the Residual Mechanism are parties to proceedings before the Residual Mechanism. The Single Judge noted that the fact that the ICTR Prosecutor was a party to the underlying trial proceedings did not in itself give him a legal standing to intervene in related contempt proceedings before the Residual Mechanism. This is because according to the Transitional Arrangements, the prosecutorial functions regarding contempt cases where no indictment was issued prior the Commencement Date have been transferred to the Prosecutor of the Residual Mechanism.[317] But because the questioned decision concerned whether the ICTR had retained jurisdiction over the contempt case, the ICTR Prosecutor does have a legal standing.[318] Further, in the decision on a motion by Stanislav Galić's defence regarding access to confidential materials in the case of Ratko Mladić, the Chamber pointed out that because of the 'residual' nature of the Residual Mechanism and for concerns of judicial economy and practicality, parties before the Residual Mechanism are considered parties before the Tribunal for the purposes of requesting access to confidential material.[319] This approach is necessary because it prevents a legal gap. Otherwise, the Prosecutor of the Tribunals would not be able to question a decision made by the Residual Mechanism that concerns one of his cases.

[316] *Prosecutor v. Simić et al.* (Case No. IT-95-9-PT), Decision on the Prosecution Motion under Rule 73 for a Ruling Concerning the Testimony of a Witness, 27 July 1999.
[317] *In Re. Deogratias Sebureze and Maximilten Turinabo* (Case No. MICT-13-40-R90), see note 217, para. 6.
[318] Ibid., paras. 9-10.
[319] *Prosecutor v. Stanislav Galić* (Case No. IT-09-92-T), see note 164, para. 5.

C. Functions Exercised Remotely

Rule 2 of the IRMCT RPE is similar to Rule 2 of the ICTY and ICTR RPE, but with relevant adjustments. Because the Residual Mechanism does not have any Bureau or ad litem judges, a definition for these is not required. [320] Instead, a definition is provided for a plenary as 'a consultation of all judges, either by convening a plenary meeting, or remotely by written procedure, as decided by the President'. The definition became relevant because of the change that the Residual Mechanism's judges are allowed to make decisions remotely. Furthermore, Rule 17 (C) IRMCT RPE is a new provision allowing judges to make the solemn declaration remotely by video-conference link, as decided by the President. While the Coordination Council met once a month at the initiative of the President under Tribunals' provisions, according to Rule 25 (C) of the IRMCT RPE the President can convene a meeting of the Residual Mechanism Coordination Council at his own initiative or upon request of any of its members. [321] However, paragraph (D) is new and provides that the President may decide to hold Residual Mechanism Coordination Council meetings remotely by videoconference link.[322] According to Rule 27 (C) of the IRMCT RPE, decisions can be taken remotely in plenary. These have to be adopted if circulated to all judges and agreed to in writing by not less than thirteen judges. In obliging the judges to work remotely, the Security Council ensured that the Residual Mechanism remains a small body with a high cost-efficiency.

D. Keeping Proceedings Short

Article 3 of the IRMCT RPE regarding languages was extended since paragraph (G) is new and provides that the Registrar has to ensure that translations are concluded in the shortest possible time. A sentence was added in paragraph (J) of Rule 90 of the IRMCT RPE regarding contempt providing that the respondent has to file a response within ten days of the filing of the appeal brief, and that the appellant may file a reply within four days of the filing of the response. A similar addition was made to Rule 108 (I) of the IRMCT Statute, which provides that the appellant has to file an appeal brief within fifteen days after filing the notice of appeal, and the respondent has to file a response within ten days of the filing of the appeal brief and the appellant may file a reply within four days of the filing of the response. Rule 42 (B) regarding the counsel provides that at the request of the accused, the Registrar may admit a defence counsel who does not speak either of the

[320] A body composed of the President, the Vice-President and the Presiding judges of the Trial Chambers, Rule 23 of the ICTY RPE and of the ICTR RPE; Also provisions regarding the Management Committee, Deputy Registrar, Deputy Prosecutor, and the Vice President have been removed, See Rule 20, Rule 21, Rule 23 ter, Rule 31, Rule 38 of the ICTY RPE and of the ICTR RPE, Rule, 33 bis of the ICTY RPE.
[321] Rule 23 bis (C) of the ICTY RPE, Rule 23 bis (C) of the ICTR RPE.
[322] Rule 25 (D) of the IRMCT RPE.

two working languages of the Residual Mechanism but who speaks the native language of the suspect or accused. But the Registrar can impose conditions, including the requirement that the counsel or accused has to pay all translation and interpretation costs, which are usually not met by the Residual Mechanism, and the counsel is not allowed to request any extensions of time as a result of the fact that he does not speak one of the working languages. The accused is allowed to require the President to review the Registrar's decision. A sentence was added providing that the President's decision on review is not subject to appeal. Rule 56 (C) (ii) regarding orders directed to states to produce documents provides that an appeal concerning these orders has to be filed within seven days of filing of the impugned decision. New to this provision is that the opposing party shall file a response within ten days of the filing of the appeal. The appellant may file a reply within four days of the filing of the response. While according to the Tribunals' provisions, all sentences of imprisonment have to be supervised by the Tribunals or a body designated by it, according to Rule 128 of the IRMCT RPE the imprisonment takes place under the supervision of the Residual Mechanism during the period of its functioning.[323] The Security Council has the power to create a body to assist it and to proceed to supervise the sentences after the Residual Mechanism legally ceases to exist. In Rule 142 (A) of the IRMCT regarding additional evidence, a sentence was added that provides when a party motions to present additional evidence before the Appeals Chamber, the opposing party has to file a response within thirty days of the filing of the motion. The moving party may file a reply within fourteen days of the filing of the response. Paragraph (C) also includes a new sentence governing the case where the Appeals Chamber finds that the evidence was available at trial. The evidence can still be admitted if the moving party can establish that the exclusion of it would amount to a miscarriage of justice. There is also an amendment to Rule 14 (E) of the IRMCT RPE regarding the referral of an indictment to another court providing that the appellant against a decision to refer a case can file an appeal brief within fifteen days after filing the notice of appeal. Whereas, the opposite party must file a response within ten days of the filing of the appeal brief, and the appellant must file a reply within four days of the filing of the response. A new provision regarding the interlocutory appeals was implemented.[324] A party that wishes to appeal from a decision where an appeal lies as of right has to file an appeal within seven days of the filing of the impugned decision. The opposing party shall file a response within ten days of the filing of the appeal. The appellant may file a reply within four days of the filing of the response. According to Rule 132 (B), in the case a certification was granted, the party granted

[323] Rule 104 of the ICTY RPE, Rule 104 of the ICTR RPE.
[324] Rule of the 132 IRMCT RPE.

certification shall file an appeal within seven days of the filing of the decision to certify. The opposing party shall file a response within ten days of the filing of the appeal. The appellant may file a reply within four days of the filing of the response. Further, pursuant to paragraph (C), when the accused is not present or represented when the decision is pronounced, the time-limits prescribed under this Rule for filing an appeal or a notice of appeal shall run from the date on which the accused is notified of the decision. In addition, in the case the Trial Chamber or the Single Judge has indicated that a written decision will follow, the time limits prescribed under this Rule for filing an appeal or a notice of appeal shall run from the filing of the written decision.

The provisions regarding time limits were also changed. Rule 152 (A) of the IRMCT RPE provides that time limits run from, but do not include, the day upon which the relevant document is filed. Rule 126 of the ICTY RPE defines the starting point for the time limit as the occurrence of an event instead of filing the relevant document. Rule 153 (B) is a new provision regarding time for filing responses to motions and provides that the appeal from judgement proceedings, a response to a motion filed by a party must be filed within ten days of the filing of the motion. A reply to the response has to be filed within four days of the filing of the response. Rule 154 (A) includes a new sentence concerning the variation of time limits, which provides that if the length of time prescribed has been increased, the total period must not exceed the maximum reasonable time limit for this type of procedural action. The amended provisions show the Security Council's intention to ensure that proceedings are kept as short as possible.

E. Restriction of Competence

Because the IRMCT RPE need to be in accordance with the IRMCT Statute, the restriction regarding the jurisdiction of the Residual Mechanism is also found in the IRMCT RPE. Rule 11 of the IRMCT RPE expresses the restriction regarding the personal jurisdiction laid down in Article 1 (2) of the IRMCT Statute, which includes only high-level fugitives and provides that the Prosecutor can apply to a Trial Chamber to issue a formal request that a national court defer cases involving such persons to the competence of the Residual Mechanism. This restriction is also laid down in the provision regarding the conduct of investigations and provides that the Prosecutor only investigates persons already indicted by the Tribunals or persons covered by Article 1 (4) of the IRMCT Statute.[325] Also, Rule 125 (A) of the IRMCT RPE regarding penalties provides that only a person convicted of a crime under Article 1 (1)- (3) of the IRMCT Statute can be sentenced to imprisonment for

[325] Rule 36 (A) of the IRMCT RPE.

a term up to and including the remainder of the convicted person's life. Rule 48 (B) of the IRMCT RPE restricts the ability of the Prosecutor to submit new inducements to the Registrar only regarding crimes defined in Article 1 (4) of the IRMCT Statute, thus including contempt and false testimony.

F. Competence of the Single Judge

Since the Single Judges were implanted for the trials at the Residual Mechanism, new provisions have been created regarding Single Judges.[326] Modifications in competence were implemented.[327] Rule 19 (G) of the IRMCT RPE regulates the absence of judges and provides that if a Single Judge is not able to continue sitting in a partially heard case for a period which is likely to be of longer duration, the President is allowed to assign another Single Judge to the case and order either a rehearing or continuation of the proceedings. But after the opening statements or the beginning of the presentation of evidence the continuation of the proceedings can only be ordered with the consent of the accused. Rule 90 of the IRMCT RPE provides that contempt cases need to be carried out before a Single Judge instead of a full Chamber of judges, which was required by the ICTR RPE and the ICTY RPE. The ICC adopted that approach and amended Rule 165 ICC RPE. The Single Judge is allowed to perform functions that would usually be exercised by a full Chamber in proceedings on alleged offences against the administration of justice, according to Rule 165 ICC RPE.[328]

G. Defence Counsel

Rule 43 (A) of the IRMCT RPE regulates the assignment of the Defence Counsel and provides that the assignment has to be in accordance with a directive set out by the Registrar and approved by the President. According to the provisions of the Tribunals' Statutes, the directive needs to be approved by the judges.[329] In addition, while the Tribunals' provisions provide that the permanent judges need to be consulted when establishing the criteria for the payment of fees to assigned counsel, pursuant to Article 43 (D) of the IRMCT RPE the Registrar establishes the criteria in consultation with the President. Further, in paragraph (C), a list was added regarding the 'Duty Counsel' and provides that: (1) the Duty Counsel needs to be situated within reasonable proximity to the detention facility of the relevant branch of the Residual Mechanism; (2) the Registrar must

[326] Rule 28, Rule 48 (A), Rule 50, Rule 51, Rule 57, Rules 63-65, Rule 69, Rule 78, Rule 86 (H), Rule 91, Rule 108.
[327] Rule 8, Rule 18 (B), Rule 70 (N), Rule 75, Rules 93-95, Rule 144.
[328] *Report on the Adoption by the Judges of Provisional Amendments to Rule 165 of the Rules of Procedure and Evidence,* 29 February 2016, para. 3.
[329] Rule 45 (A) of the ICTY RPE, Rule 45 (B) of the ICTR RPE.

at all times ensure that the Duty Counsel will be available to attend the detention facility of the relevant branch of the Residual Mechanism in the event of being summoned; (3) if an accused or suspected person is unrepresented at any time after being transferred to the Residual Mechanism, the Registrar needs to maintain a separate list of counsel who represent the accused until the counsel is engaged by the accused or assigned; and (4) when providing initial legal advice and assistance to an accused, the Duty Counsel needs to advise him of his rights including the rights under the IRMCT Statute and IRMCT RPE. Rule 43 (G) of the IRMCT RPE is a new provision and provides that under exceptional circumstances, at the request of the accused or his counsel, the Chamber can request the 'Registrar to replace an assigned counsel upon good cause being shown and after having been satisfied that the request is not designed to delay the proceedings'.

Another new provision regarding the counsel is Rule 47 (B) and (C) of the IRMCT RPE, which concerns sanctions for misconduct of the counsel and provides that sanctions are subject to appeal.[330] Further, if a counsel assigned pursuant to Rule 43 is sanctioned with being refused audience the Chamber is able to instruct the Registrar to replace the counsel. But when an appeal against the decision imposing sanctions is filed, the Registrar shall not replace counsel before the Appeals Chamber determines the appeal. Paragraph (E) provides that the Registrar needs to publish and oversee the implementation of a Code of Professional Conduct for a Defence Counsel who appears before the Residual Mechanism, which is also subject to approval by the President. This provision was extended and provides that amendments to the code have to be made in consultation with representatives of the Prosecutor and Advisory Panel, and are subject to approval by the President. In March 2016, policies for remunerating the Defence Counsel in pretrial and appeals proceedings were issued. In addition, remuneration policies for trial, contempt proceedings, and self-represented accused persons are being finalised. According to the assessment and progress report, these documents reflect best practices from both the Tribunals.[331] However, there was some criticism concerning the remuneration of the Defence Counsel, because the remuneration system of the Residual Mechanism would expect the Defence Counsel to do a lot of pro bono work.[332] The Defence Counsel for Ngirabatware and Kamuhanda is acting on a pro bono basis. In the case of Eliézer Niyitegeka the Defence Counsel was assigned only for a limited period of three months to help him prepare his review. The Residual Mechanism refused to allocate additional funds beyond that period, explaining that 'as a matter of principle, it is not for the Mechanism to

[330] Rule 47 (B) of the IRMCT RPE.
[331] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, para. 47.
[332] Yvonne McDermott, 'Fairness before the Mechanism for the International Criminal Tribunals' QIL 40 (2017), p. 48.

assist a convicted person whose case has reached finality with any new investigation he would like to conduct or any new motion he may wish to bring by assigning him legal assistance at the Mechanism's expense.' [333] This legal assistance is insufficient. The Defence Counsel should not be required to work pro bono. In order to be able to work on the case properly, the Defence Counsel needs to be appropriately remunerated. Otherwise, the fair trial rights of the accused could be violated.

H. Rights of the Accused

Rule 68 (B) of the IRMCT RPE regarding provisional release includes a new sentence, which requires that the existence of sufficiently compelling humanitarian grounds may be considered in granting such release. This is an improvement of the accused's rights. Rule 59 of the IRMCT RPE concerning the procedure after arrest was extended for paragraph (B) that provides that when an arrest is executed in respect of a warrant issued, the Registrar arranges for the transfer of an accused to the state named in the warrant of arrest. Rule 84 (B) is a new provision regarding the medical examination of the accused, who in the event of medical necessity is allowed to request an alternative or additional medical examination at a recognised medical institution that he believes to be capable of providing an impartial and qualified report on his medical condition in case he or she has reasonable grounds for such a request. However, the Residual Mechanism needs to duly consider such requests and also the following report.

A completely new provision is Rule 85, which regulates the case of the accused's death while detained under the authority of the Residual Mechanism. In the case an investigation was carried out, a copy of the entire dossier of the investigations and findings has to be transmitted to the President of the Security Council within fourteen days from its compilation. Rule 77 (B) of the IRMCT Statute regarding depositions also requires the proprio motu order that be in writing and shall 'indicate the name and whereabouts of the person whose deposition is sought, the date and place at which the deposition is to be taken, a statement of the matters on which the person is to be examined and of the circumstances justifying the taking of the deposition.' According to Rule 71 (B) of the ICTY RPE and Rule 71 of the ICTR RPE, these requirements need to be fulfilled just for the motion of a party to a deposition, but not for the proprio motu order.

A new provision is found in Rule 87 of the IRMCT RPE regulating requests for assistance of the Residual Mechanism in obtaining testimony. According to paragraph (A), a judge or bench in another jurisdiction or parties in another jurisdiction that are authorised

[333] *Eliézer Niyitegeka v. Prosecutor* (MICT-12-16-R), Decision on Niyitegeka's Motion for an Extension of the Assignment of his Counsel, 27 May 2016, para. 7.

by an appropriate judicial authority ('Requesting Authority') has the right to request the assistance of the Residual Mechanism in obtaining the testimony of a person under the authority of the Residual Mechanism for use in an on-going investigation or prosecution taking place in the jurisdiction of the Requesting Authority for serious violations of international humanitarian law committed in the territory of former Yugoslavia or the territory of Rwanda or committed by Rwandan citizens in the territory of Rwanda's neighbouring states. This request has to be submitted to the President of the Residual Mechanism, who refers the application to a Single Judge, according to Rule 87 (B) of the IRMCT RPE. However, the request cannot be granted if granting the request would prejudice on-going investigations or proceedings before the Residual Mechanism, according to Rule 87 (C) of the IRMCT RPE. According to paragraph (D), the Single Judge hears the parties to the proceedings and is allowed to grant a request after having verified that: (1) Granting the request will not risk the rights of the person under the authority of the Residual Mechanism; (2) provisions and assurances are in place for observing any protective measures granted by the Tribunals or the Residual Mechanism to the person under its authority; (3) granting the request will not result in a danger or risk to any witness, victim, or other person; and (4) no overriding grounds oppose granting the request.

Another completely new provision regulates the transfer of persons for the purpose of testimony in proceedings not pending before the Residual Mechanism. According to Rule 88 (A), a Single Judge considers the transfer of a person and is not allowed to grant unless the individual under the authority of the Residual Mechanism was duly summoned to testify and has provided his consent to the transfer. In addition, the host country to which the individual is to be transferred ('Requesting State") has to be given the opportunity to be heard and this state needs to provide written guarantees.[334] The transfer of the individual must not extend the period of the person's detention as foreseen by the Tribunals or the Residual Mechanism. Finally, no overriding grounds exist for not transferring the person to the territory of the Requesting State.[335] A person under the authority of the Residual Mechanism is an accused or convicted person detained on the premises of the detention unit or facility of the relevant branch of the Residual Mechanism.[336] The Single Judge is able to impose conditions upon the transfer of the individual, 'including the execution of a bail bond and the observance of such conditions

[334] Rule 88 (A) (iv), like to the return of the transferred individual within a stipulated period, the non-transfer of the person to another jurisdiction, the appropriate conditions of detention, and immunities from prosecution and service of process for acts, omissions, or convictions prior to the person's arrival in the territory of the Requesting State.
[335] Rule 88 (A) (i)-(vI) of the IRMCT RPE.
[336] According to Rule 88 (C) of the IRMCT RPE, the phrase 'person under the authority of the Residual Mechanism' means an accused or convicted person detained on the premises of the detention unit or facility of the relevant branch of the Residual Mechanism.

as necessary to ensure the presence of the person for trial thereafter and the protection of others.'[337] The Single Judge can also issue a warrant of arrest to secure the presence of a person who was transferred, if needed.[338] But the Single Judge can also revoke the order and make a formal request for the return of the transferred person.[339]

Rule 90 (G) of the IRMCT RPE includes a change regarding the maximum penalty for contempt. According to Rule 77 (G) of the ICTY RPE, the maximum penalty that can be imposed on an individual shall not exceed 100 000 EUR, and according to Rule 77 (G) of the ICTR RPE in the case of the ICTR the fine shall not exceed 10 000 USD. Pursuant to paragraph (G) of the IRMCT RPE, a fine shall not exceed 50 000 EUR. The fine regarding false testimony under oath has been changed as well, from 100 000 EUR under ICTY provision and 10 000 USD under ICTR provision to 50 000 EUR, according to Rule 108 (G) of the IRMCT RPE.[340]

A new regulation is laid down in Rule 98 of the IRMCT RPE for the case that the accused refuses to appear before the Residual Mechanism for trial. The Trial Chamber is allowed to order that the trial proceeds in the absence of the accused. But the requirements are that the accused has made an initial appearance, the Registrar has notified the accused to be present for trial, the accused is physically and mentally fit, the accused has voluntarily and unequivocally waived or forfeited the right to be tried in his or her presence, and a counsel represents the interests of the accused.

5. Concluding Remarks

The judicial continuity between the Tribunals and the Residual Mechanism is essential for the legacy of the ICTY and the ICTR. The Residual Mechanism is bound to interpret its Statute and Rules of Procedure and Evidence in accordance with the jurisprudence of the Tribunals. In cases where their respective Rules of Procedure and Evidence or Statutes are at issue, the Residual Mechanism is bound to consider the relevant precedent of these Tribunals when interpreting them. [341] The IRMCT RPE reflects the Security Council's aim to guarantee that the proceedings of the Residual Mechanism mirror those of the Tribunals.[342] Additionally, time limits were included, which show the Security Council's

[337] Rule 88 (B) of the IRMCT RPE.
[338] Rule 88 (D) of the IRMCT RPE.
[339] Rule 88 (E) of the IRMCT RPE.
[340] 91 (G) ICTY RPE, 91 (G) ICTR RPE.
[341] *Prosecutor v. Radovan Karadžić* (MICT-13-55-R90.3, MICT-13-58-R90.1), Decsion on Karažić Request to Appoint an Amicus Curiae Prosecutor to Investigate Contempt Allegations Against Former ICTY Prosecutor Carla Del Ponte, 27 November 2013, para. 7; *Phénéas Munyarugarama v. Prosecutor* (Case No. MICT-12-09-AR14), see note 81, paraa. 5-6; *Prosecutor v. Radovan Karadžić* (MICT-13-55-R90.3), Decision on Karadžić's Request to Appoint an Amicus Curiae Prosecutor to Investigate Officials of United States of America and in Prosecution Motions to Strike Karadžić's Supplemental Submissions, 13 March 2014, para. 12; *Prosecutor v. Milan Lukić and Sredoje Lukić* (Case No. MICT-13-52-R.1), Order Assigning Judges to a Case Before the Appeals Chamber, 24 February 2014, p. 54.
[342] Secretary General's Report, see note 58, para. 80; Rule 119 of the ICTY RPE; Rule 120 of the ICTR RPE.

intention to ensure that proceedings are kept as short as possible. This intention also explains the new provision found in Article 13 (3) of the IRMCT Statute, which provides that any amendments of the IRMCT RPE take effect upon adoption by the judges unless the Security Council decides otherwise. This is meant to prevent the Residual Mechanism from making changes to the IRMCT RPE that could jeopardise the Security Council's aim to keep the Residual Mechanism small. Therefore, the judges are not able to amend the IRMCT RPE in such manner, that proceedings would be extended. Further, Article 13 (3) of the IRMCT Statute ensures that the Residual Mechanism adopts procedures similar to that of the Tribunals. Thus, a judicial revolution of the IRMCT RPE shall be prevented in order to ensure the legacy of the Tribunals

The Transitional Arrangements allow a smooth transfer of the Tribunals' functions and responsibilities to the Residual Mechanism. In order to ensure legal certainty, decisions taken by a Trial or Appeals Chamber of the Tribunals while properly seized of the matter and prior the Commencement Date retain their validity before the Residual Mechanism. The Transitional Arrangements provide an explicit date when the Tribunals' jurisdiction ends and the jurisdiction of the Residual Mechanism begins. Because uncertainties regarding jurisdiction would result in legal insecurity, it is only consistent that decisions taken by the Tribunals after the Commencement Date do not have a legal effect on the Residual Mechanism. Thus, the Transitional Arrangements provide a clear-cut path regarding the jurisdiction of the Tribunals and the Residual Mechanism.

Indeed, the Security Council considered the criticism against the establishment of the Residual Mechanism and provided provisions addressing that criticism. First, when establishing the structure, it was ensured that the Residual Mechanism is a small and efficient body. The number of Trial Chambers was reduced, since the Residual Mechanism has one for each branch. The Residual Mechanism consists of the Prosecutor and the Registry common to both branches. The IRMCT Statute provides for a common President, who will exercise the functions at each seat of the Residual Mechanism when it is needed. A Single Judge will from now on conduct proceedings for contempt and false testimony, and the Appeals Chamber shall now be composed of three judges instead of five. The Residual Mechanism's judges are allowed to make decisions remotely, and the judges receive remuneration only for the day they exercise their function. Appropriate remuneration for the judges is necessary in order to guarantee the quality of their decisions and avoid corruption. But taking into account that the Tribunals' costs have already been under strong criticism, the Security Council needed to reduce the costs of the Residual Mechanism as much as possible when creating the Residual Mechanism. The remuneration

system needs to allow judges to work with full concentration on their cases. The Security Council could solve the problem by returning judges for certain cases to The Hague on a permanent basis. For example, in appeal cases the judge could receive remuneration while in The Hague until the decision has been issued, which would make the remuneration fairer. These changes downsize the Residual Mechanism to a small body, which also leads to saving of costs. But at the same time, the quality of the jurisdiction needs to be guaranteed. Otherwise the establishment of the Residual Mechanism would be useless.

Second, provisions were included in the IRMCT Statue that were not statutory provisions of the Tribunals. Of greatest importance are Article 1 (3) of the IRMCT Statute, which requires the Residual Mechanism only to prosecute high-level fugitives, and Article 6 (1) of the IRMCT Statute, which obliges the Residual Mechanism to refer cases to national jurisdiction concerning persons, who are not high-level fugitives. The Security Council addressed the criticism against the establishment of the Residual Mechanism by putting an important regulation of the Completion Strategy into the IRCMT Statute. This is an indication of the Security Council´s vision that referrals should be an important part in the functioning of the Residual Mechanism. This approach demonstrates the Security Council's objective to oblige the Residual Mechanism to refer cases when requirements are met. The decision to impose a mandatory obligation on the Residual Mechanism ensures that the Residual Mechanism's work is as limited as possible. This amendment appears to be the consequence for the Tribunals' practice of not referring contempt cases to national jurisdictions although they have the power to transfer those cases. Transferring cases of contempt could have reduced the Tribunals' workload. Hence, Article 1 (4) of the IRMCT Statute obliges the Residual Mechanism to transfer contempt cases to national jurisdiction in order to prevent the Residual Mechanism from taking over the Tribunals' practice. Further, Article 1 (5) of the IRMCT Statute ensures that the Residual Mechanism is not able to extend its jurisdictional competence by refusing the power to issue any new indictments against persons who are not among the most senior leaders. Article 16 of the IRMCT Statute supports this by prohibiting the Prosecutor from preparing new indictments against persons other than those. The workload of the Residual Mechanism is thus reduced, because the Residual Mechanism is obliged to transfer cases when requirements are met. These amendments are able to ensure that the Residual Mechanism completes its work expeditiously. However, as Stahn has pointed out, '"lean" justice should not turn into "cheap justice"'.[343] The IRMCT Statute and the IRMCT RPE provide regulations in accordance with fair trial rights.

[343] Carsten Stahn, 'Tribunals are Dead, Long Live Tribunals: MICT, the Kosovo Specialist

The Security Council needed to provide a Statute for the Residual Mechanism, which is in accordance with the Tribunals' Statutes. Provisions having only slight variations from analogous provisions in the Tribunals' Statutes show that the Residual Mechanism has inherited role of the Tribunals' legacy. The continuity of jurisprudence needs to be guaranteed in order to avoid legal uncertainty. Therefore, the Security Council needed to amend provisions in order to reduce the workload of the Residual Mechanism but at the same time preserve legal continuity between the Tribunals and the Residual Mechanism. Thanks to these amendments, the Residual Mechanism is a small body and the workload will be reduced, as the Residual Mechanism is now obliged to transfer cases to national jurisdiction.

Chambers and the Turn to New Hybridity' EJIL: Talk!, availiable at: https://www.ejiltalk.org/tribunals-are-dead-long-live-tribunals-mict-the-kosovo-specialist-chambers- and-the-turn-to-new-hybridity/ (last visited on 30 May 2017).

VIII. Residual Function: Preservation and Management of Archives

The management and preservation of the Tribunals' archives is the second most important function of the Residual Mechanism. Article 27 of the IRMCT Statute governs the management of the Tribunals' archives as one of the main tasks of the Residual Mechanism. Like Article 6 of the IRMCT Statute, which the concerns referral of cases to national authorities, it is a completely new statutory provision regarding to the ICTY and ICTR Statutes, but in contrast to Article 6 of the IRMCT Statute, it does not have a basis in the Tribunals' Rules of Procedure and Evidence. According to Article 27 (1) of the IRMCT Statute, the archives of the Tribunals and the Residual Mechanism shall remain the property of the UN. Therefore, the archives require special protection.[1] Furthermore, the archives need to be inviolable wherever they are located according to Section 4 of the Convention on the Privileges and Immunities of the UN of 13 February 1946.[2] Pursuant to Article 27 (2) of the IRMCT Statute, the Residual Mechanism is responsible the access to and preservation of the archives. The Tribunals' archives have to be co-located with the respective branches of the Residual Mechanism.[3] The Arusha branch of the Residual Mechanism is home to the ICTR's archives and the ICTY's archives are located at The Hague branch of the Residual Mechanism.[4] Paragraph (3) ensures the protection of confidential information. This includes information regarding protected witnesses and records provided on a confidential basis. In order to ensure this purpose, the Residual Mechanism has to implement an information security and access system, in particular for the classification and declassification of information. Since the Commencement Dates of the respective branches the Residual Mechanism, has been responsible for the management of the archives.[5] The Tribunals are responsible for preparing their records for transfer to the Residual Mechanism, and each Tribunal is responsible for managing the materials of any case that will be conducted by the Tribunals until its completion or transfer to the Residual Mechanism.[6] Pursuant to Article 6 of the Transitional Arrangements, the Tribunals were requested to make all necessary arrangements to ensure, as soon as possible, a coordinated transfer of records and archives. While the ICTR has completed the

[1] Secretary-General's *Report on the Administrative and Budgetary Aspects of the Options for Possible Locations for the Archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the Seat of the Residual Mechanism(s) for the Tribunals*, UN Doc. S/2009/258, 21 May 2009; *Statement by the President of the Security Council,* UN Doc. S/PRST/2008/47,19 December 2008, para. 15.

[2] UN General Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 13 February 1946 (1 UNTS 15). This Convention appeared In the Journal of the General Assembly, I, No. 34 (7 March 1946), pages 687-693; and in Document A/43, Annex I, pp. 5-15.

[3] Article 27 (2) of the IRMCT Statute.

[4] Article 3 of the IRMCT Statute.

[5] Article 27 (2) of the IRMCT Statute; Article 6 of the Transitional Arrangements.

[6] *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 60; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 23 May 2013 to 15 November 2013,* UN Doc. S/2013/679, 18 November 2013, para. 59.

transfer of its records, the ICTY has transferred 41% of its physical records and 80% of its digital records to the Residual Mechanism thus far.[7] Regulating the management of the archives is one of the main provisions in the IRMCT Statute, because that task represents an essential residual function that needs to be carried out by the Residual Mechanism.

1. The Great Significance of the Archives

The Tribunals' archives were primarily used for their judicial activities. But, their secondary value for memory, education, and research should not be underestimated. According to the Secretary-General's report, the archivists suggest that the records also have great value for the creation of future institutions, comparable with the Residual Mechanism.[8] Therefore, the archives need to be saved for use in future projects.

First, the proper execution of the other residual functions by the Residual Mechanism requires access to the Tribunals' records. For example, in order to carry out the victims and witness protection properly, the Residual Mechanism needs access to the records regarding victims and witnesses. In the case a witness who testified before the ICTY or ICTR is afraid for his or her security, the witnesses` case file needs to be available for the Residual Mechanism in order to decide about further measures to guarantee the safety of the witness. But access to the relevant original records of proceedings before the ICTY or ICTR is also of crucial importance when also when there are requests for review of judgement and allegations of contempt. Another example is when a decision is made regarding the referral of a case to national authorities or when a referral is revoked, necessitating on access to information on similar cases, like prior decisions, orders, and other relevant material. And if requests for pardon or commutation of sentences are filed, the convicted person's file has to be available. Any evidence regarding cooperation with the Office of the Prosecutor needs to be included.[9]

But after a certain period, the archives' secondary value in education and memory will progressively predominate. The content of the Tribunals' archives is very important to witnesses, victims, and their families, and the populations of the affected regions. Therefore, a significant part of the Tribunals' legacy are its archives, 'which are sometimes

[7] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2016,* UN Doc. S/2016/975, 17 November 2016, paras. 82, 84; *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) covering the period from 16 May 2015 to 16 November 2015,* UN Doc. S/2015/874, 16 November 2015, para. 34; *Report on the completion of the mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015,* UN Doc. S/2015/884, 17 November 2015, para.165; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, paras. 71- 72.

[8] *Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the Residual Mechanism(s) for the Tribunals,* UN Doc. S/2009/258, 21 May 2009, para. 53.

[9] Ibid., para. 55; Gabriel Oosthuizen, 'The residual functions oft he UN international tribunals oft he former Yugoslavia and Rwanda and the Special Court for Sierra Leone: the potential role oft he International Criminal Court' ICSL (2008) 14.

said to be the physical manifestation of society's collective memory, subject to responsible storage and collection for its future interpreters and narrators'.[10] As historians Schwartz and Cook stated, 'through archives the past is controlled.'[11] And fighting over the management of the archives is like a battle to control the future.[12] According to Schwartz and Cook, archives as records contain power to shape the direction of scholarship, collective memory, and national identity.[13] Hence, archives represent human identity, and the control of the Tribunals' archives equals the symbolic and physical control of the past and the control of the future. [14]

2. Contents of the Archives

The archives of the two Tribunals contain information connected to the conflicts in Rwanda and former Yugoslavia. During their activities, the Tribunals have generated many records that are different in form and medium, including electronic, audio-visual formats, paper formats, maps, photographs, objects and formats in the form of artefacts.[15] All hearings that have taken place and many interviews of witnesses and other persons of interest to the Tribunals are part of the records. The materials further include investigations, indictments and court proceedings, documents regarding the detention of accused individuals, the protection of witnesses and enforcement of sentences but also documents from states, other law enforcement authorities, international and non-governmental organisations.[16]

It was initially estimated that the archives of the two Tribunals would collectively amount to approximately 15 000 linear metres of physical records.[17] But after a more detailed inventory and appraisal, it is now estimated that the total volume is approximately 10 000 linear metres. The digital archives contain nearly three petabytes of data and tens of thousands of hours of audio-visual recordings.[18]

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[10] Irene C. Lu, 'Curtain Call at Closing: The Multi-Dimensional Legacy of the International Criminal Tribunal For Rwanda' U. Pa. J. Int'l L. 34 (2013) 859, 891; Kenneth E. Foote 'To Remember and Forget: Archives, memory, and Culture' American Archivist 53 (1990) 378.

[11] Joan M. Schwartz and Terry Cook, 'Archives, Records, and Power: The Making of Modern Memory' Archival Science 2 (2002) 2.

[12] Irene C. Lu, 'Curtain Call at Closing: The Multi-Dimensional Legacy of the International Criminal Tribunal For Rwanda' U. Pa. J. Int'l L. 34 (2013) 859, 892.

[13] Joan M. Schwartz and Terry Cook, 'Archives, Records, and Power: The Making of Modern Memory' Archival Science 2 (2002) 2.

[14] Irene C. Lu, 'Curtain Call at Closing: The Multi-Dimensional Legacy of the International Criminal Tribunal For Rwanda' U. Pa. J. Int'l L. 34 (2013) 859, 893; Brigitte Benoit Landale and Huw Llewellyn, 'The International Residual Mechanism for Criminal Tribunals: The Beginning oft he End fort he ICTY and ICTR' Int'l Org. L. Rev 8 (2011) 349, 363.

[15] Secretary-General's Report, see note 1, para. 43.

[16] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2014 to 15 May 2015,* UN Doc. S/2015/341, 15 May 2015.

[17] *Third annual report of the International Residual Mechanism Criminal Tribunals*, UN Doc. A/70/225-S/2015/586, 31 July 2015, para. 62.

[18] *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 23 May 2012 to 16 November 2012,* UN Doc. S/2012/847, 19 November 2012, para. 66; *First Annual Report of the International Residual Mechanism for Criminal Tribunals*, UN Doc. A/68/219-S/2013/464, 2 August 2013, para. 64; *Second annual report of the International Residual Mechanism for Criminal Tribunals,* UN Doc. A/69/226-S/2014/555, 1 August 2014, para. 25.

The records of the Tribunals can be classified into three main categories: (a) Judicial records related to the cases, (b) Records that are not part of the judicial records stricto sensu but were produced in relation to the judicial process, and (c) Administrative records.[19]

Judicial records consist of records of each case that were produced by the Registry, the Chambers, the Prosecutor, the Defence, the accused person, and the third parties like the states or the amicus curiae.[20] These are motions, transcripts, exhibits, orders, decisions, and judgements. Further, judicial records include the video and audio recordings of the proceedings as well as submitted artefacts. For every case the indictments, correspondence, motions, orders, internal memorandums, judgement, decisions, exhibits, disclosure, and transcripts are preserved, in hard copy and/or electronic format in English and in French. The Court Management Support Services of the ICTY Registry and the Court Management Section of the ICTR Registry managed those records.[21]

The second category contains records regarding the judicial process, but which do not belong to the judicial records of the case, like records of plenary meetings of judges and of other sub-organ or inter-organ meetings, correspondence with the UN and other entities, diplomatic meetings, data on witnesses and detainees, press releases, contracts, and commercial agreements and interviews.[22] These records were generated and managed by the Office of the Prosecutor, the Registry and the Office of the President. The records generated by the Office of the Prosecutor that were not used during the trial proceedings are managed and preserved by the Office of the Prosecutor. These records include documents connected to prosecution policy, practice, and correspondence. The Office of the Prosecutor keeps the different material and documents, including audiotapes and videotapes, interviews and statements of suspects, victims, witnesses, and accused, artefacts, information obtained from governments, UN organs, and intergovernmental and non-governmental organisations. [23]

The Prosecutor's records were managed separately from the records kept by the Registry.[24] The Office of the Registrar produced and retained different records, like those concerning privileges and immunities of the Tribunal, contracts and commercial arrangements, agreements with the host country, agreements on enforcement of sentences, claims against the organisation, agreements on relocation, diplomatic relations and other representational matters, and records regarding meetings and general correspondence. In

[19] Secretary-General's Report, see note 1, para. 44.
[20] Ibid., para. 45.
[21] Ibid.
[22] Ibid., para. 47.
[23] Ibid.
[24] Ibid.

addition, the Public Information Section of the Registry issued reports, press releases, booklets, photographs, posters, audiotapes, and videotapes, and administers the Tribunals' websites."[25] And the Office of the President detained information connected to meetings of the Tribunals' sub-organs participating in main decisions concerning its functioning, plenary meetings of the judges, diplomatic relations, annual reports, and completion strategy reports as well as various correspondence.[26]

The administrative records of each Tribunal are records regarding procurement, human resources, finance, and other administrative support functions. They were produced and managed by the Registry of each Tribunal.[27]

3. Categorisation and Disposal of Records

But not all of the Tribunals' records were important enough to be permanently preserved and transferred to the Residual Mechanism.[28] The Secretary-General's bulletin on 'Record-keeping and the management of the United Nations Archives' defines archives as 'records to be permanently preserved for their administrative, fiscal, legal historical or information value'.[29] Hence, the Tribunals faced the challenge of analysing which information have permanent value and will, therefore, be determined as Tribunals' archives, and which have only temporary value and how long these records need to be kept. [30]

In order to work out the records worthy of permanent preservation, the Tribunals worked in close cooperation towards the development of a common policy of retention and preservation for all records of the Tribunals. The ICTY recruited an archivist in July 2009 to establish a system that identified records.[31] Furthermore, the President of the ICTY appointed the Chief of the Court Management and Support Section to implement a plan regulating the review of case records and determining which records need to be declassified and which witness protection measures need to be varied. [32] The archivist worked with the Archives and Records Management Section and the Joint Tribunal Archival Strategy Working Group on the development of a records retention policy. The policy included identifying duplicate records and administrative records eligible for

[25] Ibid., para. 49.
[26] Ibid.
[27] Ibid.
[28] Ibid, para. 42.
[29] Secretary-General's bulletin, Section 1 (a), UN Doc. ST/SGB/2007/5, 12 February 2007.
[30] Secretary-General's Report, see note 1, para. 87.
[31] *Assessment and report of Judge Patrick Robinson, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004), covering the period from 15 May to 15 November 2009,* UN Doc. S/2009/589, 13 November 2009, para. 62; *Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), covering the period from 15 May 2010 to 15 November 2010,* UN Doc. S/2010/588, 19 November 2010, para. 81; *Report on the completion strategy of the International Criminal Tribunal for Rwanda (as of 1 November 2010),* UN Doc. S/2010/574, 5 November 2010, para. 71.
[32] Ibid.

disposal as well as administrative records with continuing value for transfer to the archives. The ICTR established the Legacy Committee of the Tribunal, which included representatives of the Tribunals' three organs that coordinated the work that was on-going in all sections of the Tribunal. A legal team reviewed witness protection orders and decisions issued by the Tribunal since its inception. [33]

The Tribunals, the Joint Archives Strategy Working Group, the Archives and Records Management Section, and the Office of Legal Affairs met in February 2011 at the ICTY and worked together to establish an information security and access system for the records of the Tribunals and the Residual Mechanism. [34] In 2012, the Residual Mechanism's Archives and Records Section took over the implementation and development of the record-keeping policies for the Tribunals. A new Secretary-General's bulletin was implemented for these purposes.[35] On 20 July 2012, the Secretary-General issued a bulletin entitled 'International Criminal Tribunals: information sensitivity, classification, handling and access,' which describes the classification process of records and information. [36] In addition, the handling of the records needed to be in accordance with the Secretary-General's bulletins 'Record-keeping and the management of the United Nations Archives' and 'Information sensitivity, classification and handling,' both issued in 2007.[37] In recognition of the unique nature of the work of the ICTY, the ICTR, and the Residual Mechanism, the bulletin provided information concerning the management of the documents for the three institutions. It also established the basis for the security and access policies as well as procedures to be applied to the records after they were transferred and the practices to be put in place regarding the security, access and handling of the information and records generated during the work of the Residual Mechanism.[38]

According to section 3.1 of the Secretary-General bulletin 'International Criminal Tribunals: information sensitivity, classification, handling and access', each of the Tribunals is responsible for determining the security level of all records and information within its competence.[39] The determination of security classification levels of the judicial records lies with the Chambers or the President of the Tribunal that has competence.[40] But

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[33] *Report on the completion strategy of the International Criminal Tribunal for Rwanda,* UN Doc. S/2009/587, 12 November 2009, para. 71; *Report on the completion strategy of the International Criminal Tribunal for Rwanda,* UN Doc. S/2011/731, 16 November 2011, para. 95.
[34] Ibid.
[35] *Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004),* UN Doc. S/2011/316' 18 May 2011, para. 102.
[36] Secretary-General's bulletin, *International Criminal Tribunals: information sensitivity, classification, handling and access,* UN Doc. ST/SGB/2012/3, 20 July 2012.
[37] Ibid., Section 1.1.
[38] *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 23 May 2012 to 16 November 2012,* UN Doc. S/2012/847, 19 November 2012, para. 71.
[39] Section 3.1 of the Secretary-General's bulletin, *International Criminal Tribunals: information sensitivity, classification, handling and access,* UN Doc. ST/SGB/2012/3, 20 July 2012.
[40] Ibid., Section 3.2.

the authority to determine the security classification levels of non-judicial records and information lies with the head of the organ that initially created them.[41] Section 1 of the Secretary-General's bulletin 'Information sensitivity, classification and handling' and Section 4 of the Secretary-General's bulletin 'International Criminal Tribunals: information sensitivity, classification, handling and access' contains the classification principles including the description of when a document has to be classified as sensitive, like in the case of personal information related to persons or families of such persons who have been or are currently detained by the ICTY or ICTR.[42]

When categorising records, the provisions regarding the change in classification were of particular importance. Section 6.1 of the Secretary-General's bulletin 'International Criminal Tribunals: information sensitivity, classification, handling and access' regulates that changes to the classification levels of judicial records shall be effected only after judicial authorisation or as otherwise provided for by the applicable Rules of Procedure and Evidence of the respective Tribunal. Non-judicial records and information may be reviewed for possible declassification 50 years or 20 years after the date of creation depending on the type of classified non-judicial records and information.[43] However, the head of the organ that originally classified the information or the successor of that original organ may review on an item-by-item basis non-judicial records which do not contain information classified by judicial authority and which initially were classified as 'strictly confidential'. The declassification is possible 20 years after the date of creation. [44] And records that are classified as 'confidential' shall be declassified automatically 20 years after the date of creation or acquisition.[45] But according to Frisso, the application of that provision to the Tribunals' records raises some issues. Documents that include decisions that are classified as confidential cannot be automatically declassified without a judicial decision.[46] This could result in misuse and consequently endanger the victims and witnesses. The alternative mentioned by Acquaviva is that confidentiality should not be lifted before all convicted persons and other persons involved in the decisions have passed away.[47] On the one hand, it is more practical to declassify confidential information automatically after 20 years. The workload would be reduced because the amount of confidential information that requires special protection would

[41] Ibid., Section 3.3.
[42] Ibid., Section 4. 2 (c).
[43] Ibid., Section 6. 2 and 6.4.
[44] Ibid., Section 6.5 (a).
[45] Ibid., Section 6.5 (b).
[46] Giovanna M. Frisso, 'The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims' GoJIL 3 (2011) 1039, 1119.
[47] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', 'Best Before the Date Indicated: Residual Mechanisms at the ICTY' in Albertus Henricus Joannes Swart, Alexander Zahar, Göran Sluiter (eds.) *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford University Press, Oxford 2011), p. 24.

decrease. The special management measures for confidential documents necessitate being kept separately from public documents and under strict security conditions.[48] The Residual Mechanism will be responsible for guaranteeing protection of those confidential records. Hence, the Residual Mechanism needs to implement special security measures regarding confidential information, so that no unwarranted outside access is possible. Since the Tribunals started their mandate they have received many confidential documents and information but on the presumption that these documents would never be made public. Documents regarding protected witnesses were classified as confidential. But also transcripts of closed trial sessions or confidential administrative documents are considered as confidential information.[49] A huge part of the documents at the Office of the Prosecutor were provided to the Prosecutor on a confidential basis.[50] According to Rule 70 of the ICTY and ICTR RPE, these records shall not be disclosed without the consent of the person or entity that provided information in the first place. This would result in an obstruction for the Prosecutor to get information.

The proportion of confidential records to public records varies.[51] But it will vary even more over time because more records will be declassified and made publicly available. The accessibility of the records is important for the people of the affected countries in order to understand and to process what they have experienced. Also of great importance is the commemorative function of the archives. However, it is necessary to find a balance between protecting the confidentiality of sensitive records and ensuring the accessibility of the records. The safety of the victims and witnesses is of crucial importance. Conflicts still exist between the different ethnic groups left and information regarding victims and witnesses could put them in danger. Therefore, the solution to declassify information after the death of the convicted person and other persons involved in the decision would be preferable in order to guarantee the safety of victims and witnesses. Supporting the Tribunals' efforts, the Residual Mechanism Archives and Records Section provided training and prepared guidelines to ensure that the records were prepared in conformity with the applicable standards. The training contained executive

[48] *Report of the Secretary-General on the administrative and budgetary aspects of the options for possible locations for the archives of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda and the seat of the Residual Mechanism(s) for the Tribunals,* UN Doc. S/2009/258, 21 May 2009, para. 43; Catherine Denis, 'Critical Overview of Residual Functions' of the Residual Mechanisms and its Date of Commencement (including Transitional Arrangements)' JICJ 9 (2011) 819, 835; Giovanna M. Frisso, 'The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims' GoJIL 3 (2011) 1039, 1119.
[49] Secretary-General's Report, see note 1, para. 43.
[50] Ibid.
[51] Ibid., para. 43.

briefings for Tribunal managers and half-day training sessions for designated staff that will carry out the detailed work of preparing and transferring records. [52]

4. Finding a Suitable Location for the Archives

One of the main issues was to find a suitable location to house the archives. Starting from the premise that the control of the Tribunals' archives equates the symbolic and physical control of the past and the control of the future.[53] For that reason, the affected countries have not been considered as a suitable location for the archives.

A. Decision-Making Process

In their decision-making processes the ICTY and the ICTR had to conduct further study before providing their position on the matter to the Security Council. Thereafter, the Registrars of the Tribunals created a joint an Advisory Committee on Archives (ACA) in September 2007, chaired by Justice Richard Goldstone, to analyse the needs for the future location and management of the archives.[54] But at the same time the mandate included an independent analysis of how best to ensure future accessibility of the archives.[55] The ACA undertook consultations with relevant stakeholders including governments, victims groups, international organisations, regional organisations, and civil society worldwide.[56] The results in accordance with the outputs of other on-going consultations undertaken by the Tribunals formed the basis of their recommendations to the Security Council for its consideration. The difficulty was to balance practical and financial considerations with the need to provide access to the victims and the public at large.

In September 2008, the ACA provided a final report, made 34 recommendations, and submitted a comparative examination of two options for the housing of the archives of the ICTY and the ICTR. One option was to locate both archives at UN Headquarters in New York, and the other option was to have two separate locations, one in Europe for the ICTY archives (The Hague, Geneva, Vienna or Budapest) and one in Africa for the ICTR archives (Nairobi, Arusha or Addis Ababa).[57] However, the ACA strongly recommended separate locations for the archives, which should be located on the continent of each

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[52] *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) and covering the period from 19 November 2013 to 16 May 2014,* UN Doc. S/2014/351,16 May 2014, para. 56.

[53] Irene C. Lu, 'Curtain Call at Closing: The Multi-Dimensional Legacy of the International Criminal Tribunal For Rwanda' U. Pa. J. Int'l L. 34 (2013) 859, 893.

[54] Secretary-General's Report, see note 1, para. 185; Gabriel Oosthuizen and Robert Schaeffer, 'Complete justice: Residual functions and potential Residual Mechanisms of the ICTY, ICTR and SCSL' HJJ 3 (2008) 48, 56; Catherine Denis, 'Critical Overview of Residual Functions' of the Residual Mechanisms and its Date of Commencement (including Transitional Arrangements)' JICJ 9 (2011) 819, 833.

[55] Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 185; *Report on the completion strategy of the International Criminal Tribunal for Rwanda,* UN Doc. S/2007/676, 20 November 2007, para. 53.

[56] *Report on the completion strategy of the International Criminal Tribunal for Rwanda,* UN Doc. S/2008/322, 13 May 2008, para. 63.

[57] Secretary-General's Report, see note 1, para. 185.

affected area. Further, the ACA pointed out that the archives of the Tribunals would be inextricably linked to the performance of residual functions. According to the ACA's report, as long as the archives contain confidential information they should not be transferred to the affected countries.[58] But at the same time, the ACA suggested that when there is no longer confidential information the archives, the UN could transfer the archives to an affected country while retaining ownership.[59] Most of the recommendations made by the ACA were endorsed by the Tribunals, like the suggestion of locating the archives of each Tribunal separately in Europe and in Africa. The Tribunals agreed that some criteria needed to be taken into account when evaluating the suitability of a location, including archival integrity, security, preservation, access, technology, classification, and declassification.[60] At the same time the ICTY did not support the ACA's recommendation that the UN should consider transferring physical custody of the archives to the countries of former Yugoslavia when confidential information no longer existed. According to the ICTY, it would be necessary to copy the entire archive for each of the countries of former Yugoslavia, which would be impossible to do in the future, both politically and logistically. But the ICTY agreed on the option of transferring the archives to one location in the countries of former Yugoslavia after all the confidential records were declassified. The Tribunal also recommended as possible locations other locations in Europe where large UN common system operations are present, such as Bonn, Rome and Paris.[61]

The Secretary-General relied on the report of the ACA when considering possible locations for the archives. But he also made his own consultations with the UN and other offices at possible locations as the locations recommended by the ACA.[62] However, the principles highlighted in the Secretary-General's report and the results of his preliminary consultations with possible locations provided a good basis for the Security Council's decisions regarding the location of the Tribunals' archives. The Secretary-General's report considered thirteen potential locations in Africa and Europe where the UN is present, in addition to further eight 'non-Tribunal' agency offices.[63] In addition, The Hague and Arusha were considered because they were the locations of the Tribunals, and the ICTY as well as the ICTR provided much information about their current locations. The report also pointed out that there were long-term strategic considerations to bear in mind as well. Besides the ICTY and ICTR, several other ad hoc UN or UN-assisted criminal tribunals

[58] Ibid.
[59] Ibid., para. 186.
[60] Ibid.
[61] Ibid.
[62] Ibid., para. 188.
[63] The United Nations Office at Nairobi, the Economic Commission for Africa, the United Nations Office at Vienna, the United Nations Office at Geneva, the Food and Agriculture Organization of the United Nations (FAO), The United Nations Interregional Crime and Justice Research Institute, the United Nations Volunteers/UNDP Office in Bonn and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

exist, which will require some sort of residual mechanisms with functions similar to those of the Residual Mechanism.[64] The interests of the people who were affected by the horrible conflicts are important. Therefore, it is of crucial importance that the archives' public parts, which guarantee fostering memory and reconciliation, are accessible to the affected people. But at the same time, it is necessary to protect the confidential information in the Tribunals' archives that were provided to the ICTY and the ICTR by individuals, entities, and states. Therefore, the report suggested a location for two branches of a Residual Mechanism or two Residual Mechanisms, in Europe regarding the ICTY and in Africa regarding the ICTR. The Residual Mechanism should be attached to existing UN offices or to a different international organisation offering similar security and enjoying similar privileges and immunities, like the ICC. The Archives and Records Management Section in New York indicated that it is not able to house the Tribunals' archives at the UN Headquarters. In addition, capital investment would be necessary to do so. However, there is no criminal courtroom facility at the UN Headquarters for the judicial work of the Residual Mechanism.[65]

B. The Decisive Criteria

Some criteria and standards needed to be considered when deciding on the location for the archives of the Tribunals and the Residual Mechanism. First, the archives needed to be kept as an entity. This belongs to the principle of archival integrity, as 'the records of a given agency should be kept together as the records of that agency, such records should be kept, as far as possible, in the arrangement given them in the agency in the course of its official business, such records should be kept in their entirety, without mutilation, alteration, or unauthorised destruction of portions of them'.[66] According to this, each of the Tribunals' archives should be kept as a complete entity and, thus, transferring the confidential records and the public records to different locations would not have been in accordance with this principle.

Keeping the archives accessible was another important criterion. The archives provide important information for the people of the affected countries that could help to contextualise the experiences and also alleviate their suffering. This information may vindicate their memory and status. Furthermore, the access to the archives is guaranteed in the victims' rights to the truth.[67] But it needed to be balanced with the requirement to

[64] Apart from ICTY and ICTR, the Special Court for Sierra Leone and the Special Tribunal for Lebanon. The Extraordinary Chambers in the Courts of Cambodia is a national Cambodian court, and may not have a similar need for an international Residual Mechanism.
[65] Secretary-General's Reprt, see note 1, para. 247.
[66] Theodore R. Schellenberg, *Modern Archives: Principles and Techniques* (Chicago, The University of Chicago Press 1956), p. 15.
[67] Giovanna M. Frisso, 'The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims' GoJIL 3 (2011) 1039, 1118; *Question of the impunity of perpetrators of human rights violations (civil and political) (1997),*

protect confidential records provided by individuals, entities and states, like protected witnesses and governments providing confidential information to the Prosecutor.[68] In order to prevent unauthorised access to confidential records and to preserve the integrity and authenticity of the archives, the security of the documents must be guaranteed. Otherwise, individuals who submitted information or testified before the ICTY or ICTR could be in danger. Furthermore, a failure to ensure the security of the archives would raise problems of national security for states and breach the Tribunals' obligation to uphold confidentiality. Therefore, confidential information had to be appropriately classified or declassified and protected from unauthorised access. The institution that would house the archives needed a robust physical security infrastructure.[69]

And as technology changes in order to preserve the Tribunals' archives, in particular audio-visual and other digital records, it was required to move to new applications to guarantee that the archives are kept accessible. In addition, preservation also required that the physical infrastructure was able to provide the capacity to house the hard copy and digital material in appropriate environmental and storage conditions.[70] The ICTY as well as the ICTR estimated that at least 700 square metres are required to manage its respective archives. This includes 'approximately 400 square metres for repository floor space and 150 to 200 square metres for office space and a study area.'[71] Therefore, access also refers to the ability to locate information by using catalogues, indexes, or finding aids. But the permission to locate and receive the information needed to be limited by legally established restrictions of privacy, confidentiality, and security clearance.[72] Therefore, the Secretary-General's report recommended 'a free-standing facility or a part of a shared building that is capable of being completely isolated from other activities', which needed to afford 'protection against fire, flood, damp, dust, pollutants, and pests, with floors able to bear the heavy load of compact shelving. But separate storage areas meeting international standards of climate control and protection against dust, dirt, and pollutant gases were also needed'.[73]

a. Potential Users as Important Criteria

In order to be able to determine which records needed to be preserved and what access needed to be provided, it was first necessary to clarify who the users of the archives would

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UN Doc E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997; M. Cherif Bassiouni, 'International Recognition of Victims' Rights', Hum. Rts. L. Rev. 6 (2006) 203, 261.

[68] Secretary-General's Report, see note 1, paras. 201, 202.

[69] Ibid., para. 196.

[70] Ibid., para. 197.

[71] Ibid., para. 192.

[72] Ibid., para. 198.

[73] Ibid., para. 199.

be. That was an important factor when deciding the location of the archives, because location of the Tribunals depended also on the interests of potential users. The people directly affected by the conflicts will be very interested in the archives. Thus, the archives' function is to foster memory and reconciliation. But government officials, other international tribunals and courts, journalists, historians, legal researchers, and political scientists will also request access to the Tribunals' archives.[74]

Of great importance was that national authorities and also national immigration authorities would have access to the records of the Tribunals, including confidential materials, when investigating and prosecuting persons. According to the Secretary-General's report, the national authorities of the affected countries and also other countries that are holding trials have requested records of the ICTY as well as of the ICTR increasingly over the years.[75] But administrative records, too, will have primary value for former staff members of the ICTY and ICTR who may wish to access their personal data in the years after the closure of the Tribunals. But only a small amount of administrative material will likely have archival value.[76] Different parts of the public will be interested in accessing the archives both for their legal and commemorative value, including prosecutors, national judges, defence counsel, and victims. For example, if they wish to raise new challenges regarding old cases based on existing material, they may need support for filing or challenging new indictments in their own domestic jurisdictions or in gathering information on protected witnesses. Other governmental agencies may also have an interest in accessing such records. This raises the question of which entities will be allowed access to confidential information and under what conditions. Since the Residual Mechanism started functioning, the main users of the records have been the Prosecutors, the Registrars, the judges, the respective staff members, and the Defence counsel. For example, in the case of the arrest and trial of a fugitive, it is necessary that the material connected to the case is made available. That includes the supporting material, the indictment, and other material regarding the case, such as the Prosecution files and orders and decisions issued by a judge or Chamber. Furthermore, any party in a case at the Residual Mechanism or authorised parties in other jurisdictions need access to the Tribunals' records connected to their case when requested.[77]

[74] Ibid., para. 59.
[75] Ibid., para. 56.
[76] Ibid., para. 57.
[77] Ibid., para. 54.

b. Affected Countries as Potential Location

Locating the archives in the affected areas appeared unfeasible because there was no existing location in the affected countries that would meet international standards for security, preservation, and access to the archives.[78] Other options were more feasible to guarantee that the Tribunals' public records remain available to the populations of the affected countries, in particular locations close to the affected areas and information centres.[79]

Regarding the ICTY archives, it would be very challenging to find a feasible location in the affected countries meeting all necessary requirements. The ICTY archives concern six different countries. The City of Sarajevo in BIH was willing to house the ICTY archives,[80] but Serbia and Croatia explained their concerns and requested that the Residual Mechanism as well as the archives be located outside the area of former Yugoslavia.[81] Both countries preferred the option of locating the archives in a single site, such as The Hague, where they are currently located. According to the government of Croatia, it is also necessary that the ICTY archives remain in Europe. But other locations where the UN has a presence and where the required archiving capacity and protocol is available needed to be considered as well.[82] Croatia and Serbia preferred the ICTY archives being centralised as an entity and managed at one location. But Croatia and Serbia refused to locate the archives of the ICTY in any of the countries in the area of former Yugoslavia, because they feared that the access to the archives would not be equal for the people of all affected countries.[83] Further, Croatia doubted that the required archiving standards would be met if the archives were located in the area of the affected countries. Conversely, Serbia expressed the view that if the ICTY archives were returned to the region of former Yugoslavia, they should be located in the Archives of Yugoslavia in Belgrade.[84] Furthermore, an accurate protection of the records of the atrocities committed in former Yugoslavia was necessary in order avoid a future denial that the horrible crimes happened.[85] According to the Prosecutor's report on the Completion Strategy, a serious problem in the context of denial is the general political climate throughout the region. Some media obviously serves the interests of alleged war criminals and often presented

[78] Secretary-General's Reprt, see note 1, paras. 213-216; Brigitte Benoit Landale and Huw Llewellyn, 'The International Residual Mechanism for Criminal Tribunals: The Beginning of the End for the ICTY and ICTR' Int'l Org. L. Rev. 8 (2011) 349, 363.
[79] Secretary-General's Reprt, see note 1, para. 216.
[80] Letter dated 1 April 2008 from the Mayor of the City of Sarajevo to the Secretary-General.
[81] Letter dated 29 January 2009 from the Permanent Representative of Croatia to the United Nations addressed to the Secretary-General; letters dated 10 November 2008 and 24 March 2009 from the Permanent Representative of Serbia to the United Nations addressed to the Secretary-General.
[82] Secretary-General's General, see note 1, para. 213.
[83] Ibid.
[84] Ibid., para. 214.
[85] Giovanna M. Frisso, 'The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims' GoJIL 3 (2011) 1039, 1117; Minna Schrag, The Yugoslav War Crimes Tribunal: An Interim Assesment' Transnational Law & Contemporary Problems 7 (1997) 15, 19.

these as 'national heroes, while neither the victims nor the crimes receive much attention, as the latter are not simply denied.'[86] Because of the fear of reprisals, witnesses, and especially insider witnesses, might refuse to testify.

But Rwanda also expressed its desire and willingness to house the ICTR archives.[87] It highlighted the important historical value of these archives in the reconciliation process. The bid for custody gained the support of the East African Community.[88] The Secretary General of the East African Community, Richard Sezibera, sent a letter to the UN in October 2012 in order to support Rwanda's housing the archives.[89] According to Monique Mukaruliza, the Minister of the East African Community, 'it would not be fair for the documents of the Genocide that happened in Rwanda to be hosted in Arusha.'[90] But in March 2010, an Expert Group Meeting pointed out the importance of securing the Tribunals' archives. Its final report highlighted the 'need to retain an accessible archive which will notably assist to prevent historical revisionism in the affected regions and therefore avoid fuelling future conflict.'[91] Furthermore, this report included a specific section on the special considerations involving the ICTR archives, which are 'essential to the long-term memory or memorialization of the conflict.'[92] In Rwanda, the Rwandan Patriotic Front-dominated government disseminated a national reconciliation program protecting the singular narrative of Rwandan genocide history.[93] However, this twisted narrative reduces the participation of the Rwandan Patriotic Front in atrocities committed during the genocide. The aim to erase differences in 'ethnic identities is an essential element of institutionalizing the hegemonic power aspirations of a minority Tutsi elite. It is perpetuated through the indoctrination of hundreds of thousands of Rwandans in mandatory live-in solidarity educations camps (ingandos), civic education camps, and preserved by Gacaca courts.'[94] According to Denis, the Rwandan national reconciliation program is a part of the government's systematic strategy to manipulate the historical

[86] *Letter dated 23 November 2004 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council,* UN Doc. S/2004/897, 23 November 2004, para. 29.

[87] Secretary-General's General, see note 1, para. 215; Letter dated 23 March 2009 from the Permanent Representative of Rwanda to the United Nations addressed to the Secretary-General; Brigitte Benoit Landale and Huw Llewellyn, 'The International Residual Mechanism for Criminal Tribunals: The Beginning oft he End fort he ICTY and ICTR' Int'l Org. L. Rev 8 (2011) 349, 363; Cecile Aptel, 'Closing the UN International Criminal Tribunal for Rwanda: Completion Strategy and Residual Issues' NEW ENG J. INT'L & COMP. L (2008) 169, 178.

[88] Irene C. Lu, 'Curtain Call at Closing: The Multi-Dimensional Legacy of the International Criminal Tribunal For Rwanda' U. Pa. J. Int'l L. 34 (2013) 859, 892.

[89] Letter from the Secretary-General [East African Community] to the Presi-dent of the Security Council (Oct. 18, 2002); Irene C. Lu, 'Curtain Call at Closing: The Multi-Dimensional Legacy of the International Criminal Tribunal For Rwanda' U. Pa. J. Int'l L. 34 (2013) 859, 892.

[90] Eric Kabeera, 'EAC Backs Rwanda to Host ICTR Archives' THE SUNDAY TIMES, 2 December 2012, http://www.newtimes.co.rw/news/index.php?i=15194&a=13081 (last visited on 11 April 2017).

[91] Final Report of the Expert Group Meeting on 'Closing the International and Hybrid Criminal Tribunals: Residual Mechanisms To address Residual Issues' International Centre for Transitional Justice, Briefing Paper, 1 February 2010.

[92] Ibid., p. 5.

[93] Irene C. Lu, 'Curtain Call at Closing: The Multi-Dimensional Legacy of the International Criminal Tribunal For Rwanda' U. Pa. J. Int'l L. 34 (2013) 859, 893.

[94] Ibid., p. 894; Filip Reyntjens, 'Constructing the Truth, Dealing with Dissent, Domesticating the World: Governance in Post-Genocide Rwanda' AFR. AFF. 110 (2011) 30, 31.

narrative in order to suit current regime interests.[95] Further, Denis states that the records 'of universal collective memory narratives of accountability and responsibility, should not be held hostage to a regime that has tried-and thus far with success-to extinguish inconvenient truths of the crimes it committed against humanity under the shadow of the genocide.'[96]

But one of the key considerations raised in discussions concerning the archives was the need for the people affected by the conflicts to have access to them. In particular, the argument that the Tribunals were created to support the 'process of national reconciliation and restoration and maintenance of peace in the affected countries' was used.[97] However, the secure adherence of the archives to international standards and the continued protection of confidential information had to be guaranteed. These important considerations were balanced with the strong judicial and practical arguments in favour of co-location of the archives with the respective branches of the Residual Mechanism. Because of the special nature of the Tribunals and the Residual Mechanism as judicial institutions and the link between them, a co-location was the most secure and efficient option. Concerning the Commencement Dates for the two branches with significant transitional overlap periods with the ICTY and ICTR, co-locating the archives with the Residual Mechanism was the more reasonable solution. Most of the functions performed by the Residual Mechanism require access to the Tribunals' original records. But the Residual Mechanism will also generate new records related to the archives of the ICTY and the ICTR. If the archives were located and managed separately from the Residual Mechanism, some kind of archives unit would be necessary to manage the records of the Residual Mechanism.

Over time, however, the staffing estimate regarding such an archives unit would become similar to the estimate regarding stand-alone management of the archives. Therefore, in the case that the Security Council had established a stand-alone unit to manage the Tribunals' archives, that stand-alone unit would have duplicated most of the work of the archives unit of the Residual Mechanism and consequently increased costs. The access to information or other documents in the archives required as evidence in a trial is quicker, cheaper and more secure since the archives are co-located with the Residual Mechanism. On the one hand, creating a 'chain of custody' over the evidence is more straightforward, while on the other hand, the security or physical risks associated with moving the evidence is lower. Hence, the administration of the archives by the Residual

[95] Irene C. Lu, 'Curtain Call at Closing: The Multi-Dimensional Legacy of the International Criminal Tribunal For Rwanda' U. Pa. J. Int'l L. 34 (2013) 894.
[96] Ibid.; Brigitte Benoit Landale and Huw Llewellyn, 'The International Residual Mechanism for Criminal Tribunals: The Beginning of the End for the ICTY and ICTR' Int'l Org. L. Rev. 8 (2011) 349, 364.
[97] UN Security Council Resolutions 808 (1993), UN Doc. S/RES/808, 22 February 1993; UN Security Council Resolution 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994.

Mechanism strengthens the efficiency of the Residual Mechanism and reduces the risks and costs that would have been generated by separate management and/or separate location. Thus, separate locations and management would have produced more risks and costs concerning the transport of original records from the archives of the ICTY and the ICTR to the Residual Mechanism whenever needed for use in a trial or for the residual functions. The most practical solution to maintain the Tribunals' archives in The Hague and Arusha whilst encouraging the establishment of information centres in the affected countries to facilitate access. However, housing the archives at any of the potential locations would have involved significant initial capital spending. And moving them to another location would have inevitably involved capital spending as well as issues that could occur when moving all records. Therefore, housing the Tribunals' archives in two locations for only a couple of years and then moving them to another location was not considered by the Security Council, because this would not have been reasonable.

C. Establishing Information Centres

The Secretary-General recommended the implementation of 'information centres' where copies of the most important public records would be made available.[98] It is questionable whether information centres are a sufficient approach to support the process of national reconciliation.[99] However, the affected countries have considered this suggestion a suitable option. The Security Council implemented the recommendation in Resolution 1966 (2010), which requests the Tribunals and the Residual Mechanism according to Article 15 of the IRMCT Statute 'to cooperate with the countries of the former Yugoslavia and Rwanda, as well as with interested entities to facilitate the establishment of information and documentation centres by providing access to copies of public records of the archives of the Tribunals and the Residual Mechanism, including through their websites'. According to Frisso, providing information centres in the affected countries of former Yugoslavia seems particularly important, because the wars in the region of former Yugoslavia were driven by betrayal and denial, and the population can only overcome their past within the family, community, and society at large.[100]

The Head of Chambers was asked in September 2009 to work on a feasibility study. The Head of Chambers went on a mission to the area of former Yugoslavia and talked with government officials, non-governmental organisations, legal professionals, victims'

[98] Secretary-General's Report, see note 1, para. 235.
[99] UN Security Council Resolutions 808 (1993), see note 97; UN Security Council Resolution 955 (1994), see note 97.
[100] Giovanna M. Frisso, 'The Winding Down of the ICTY: The Impact of the Completion Strategy and the Residual Mechanism on Victims' GoJIL 3 (2011) 1039, 1119; Eric Stover *The Witnesses: War Crimes and the Promise of Justice in The Hague* (University of Pennsylvania Press, Pennsylvania 2007), 145; Brigitte Benoit Landale and Huw Llewellyn, 'The International Residual Mechanism for Criminal Tribunals: The Beginning oft he End fort he ICTY and ICTR' Int'l Org. L. Rev 8 (2011) 349, 364.

groups, scholars, and others. In January 2010, she sent the report to the Security Council for its consideration. Subsequently, The Secretary-General sent this report to the Security Council's President for distribution to the members of the Security Council. The report came to the conclusion that the region approved of the idea of creating information centres but that national officials also expected a concrete request upon the establishment of such centres before giving any support. The President created the Informal Consultative Working Group on the Establishment of Information Centres in the Region of former Yugoslavia. This working group was made up of national officials from that area. UN Development Programme representatives from each of affected the countries and a representative from the UN Interregional Crime and Justice Research Institute were asked to observe the Informal Consultative Working Group. However, the aim of the Working Group is to allow national authorities to analyse whether they want an information centre to be created within their territories. In addition, they need to develop an idea of the composition of such information centres. These ideas will subsequently be further developed and modified through talks with civil society in that particular area.

The first meeting of the Informal Consultative Working Group was held in Slovenia, in September 2010. The Slovenian government co-organised and hosted the meeting. Further, it allowed the Working Group to identify the steps needed to establish the information centres. The Tribunals prepared the specific project proposal regarding the establishment of information centres, and members of the Working Group commented on those proposals. Thereafter, options for soliciting funding for the project, including the organisation of a donors' conference, were discussed.[101] Pursuant to Article 15 of the IRMCT Statute, the Residual Mechanism and the ICTY sought the cooperation of the governments of the states of former Yugoslavia in establishing information and documentation centres to provide public access to the Tribunals' public records and archives. The government in BIH supported the establishment of information centres in

[101] *Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), covering the period from 15 May 2010 to 15 November 2010,* UN Doc. S/2010/588, 19 November 2010, para. 81; *Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004),* UN Doc. S/2011/316, 18 May 2011; *Assessment and report of Judge Patrick Robinson, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), covering the period from 15 May to 15 November 2011,* UN Doc. S/2011/716, 16 November 2011, para. 77; *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 15 November 2011 to 22 May 2012,* UN Doc. S/2012/354, 23 May 2012, para. 84; *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 23 May 2012 to 16 November 2012,* UN Doc. S/2012/847, 19 November 2012, paras. 87-88; *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), and covering the period from 16 November 2012 to 23 May 2013,* UN Doc. S/2013/308, 23 May 2013, paras. 93-94; *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) and covering the period from 19 November 2013 to 16 May 2014,* UN Doc. S/2014/351, 16 May 2014, paras. 63-65.

Sarajevo and Srebrenica.[102] The Web Unit of the Communications Service led a major multimedia project on the occasion of the twentieth commemoration of the Srebrenica genocide. This multichannel and multilingual communications campaign paid tribute to the victims and presented the work of the Tribunal in adjudicating the crimes committed in 1995.[103] The Web Unit reached a milestone in the Legacy Websites Project with the integration of the redesigned website of the ICTY into a unified content management system in which the websites of the Residual Mechanism and ICTR already operate. [104]

The ICTR continued the work through its outreach programme in showcasing, disseminating, and sensitising the people of the Great Lakes region, the population of Rwanda at the grass-roots level, and visitors of the Tribunal headquarters in Rwanda and the United Republic of Tanzania about the challenges and achievements at this difficult point of the Completion Strategy.[105] Through its External Relations and Strategic Planning Section, the ICTR has continued to provide the Umusanzu mu Bwiyunge Information and Document Centre in Kigali and its 10 provincial satellite centres in Rwanda with technical support. At the same time, the ICTR continuously assessed their impact and progress on the targeted beneficiaries.[106] The Residual Mechanism worked with the staff of these centres to enhance accessibility to the public records and archives of the ICTR. Such efforts included providing training to the Umusanzu staff in April 2011.[107] The centres are one of the main parts of the Tribunals' legacy for future generations. Further, the information centres serve as the UN's reference centre regarding information and knowledge on genocide for the benefit of the whole international community.

The establishment of information centres in the affected countries to give access to copies of the public records is a proper solution. On the one hand, the people of the affected countries are able to access information regarding the crimes committed against humanity and on the other hand, the protection of the records is guaranteed. The co-locations in The Hague and Arusha meet international standards for security and preservation. Therefore, the information centres are the best option to support the process

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[102] *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) covering the period from 16 May 2015 to 16 November 2015,* UN Doc. S/2015/874, 16 November 2015, para. 40.

[103] Ibid., para. 41.

[104] Ibid., para. 42; *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) and covering the period from 17 May to 15 November 2014'* UN Doc. S/2014/827, 19 November 2014, para. 47; *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) and covering the period from 16 November 2014 to 15 May 2015,* UN Doc. S/2015/342, 15 May 2015, paras. 54-55.

[105] *Report on the completion strategy of the International Criminal Tribunal for Rwanda,* UN Doc. S/2010/259, 28 May 2010, para. 71.

[106] Ibid., para. 76; *Report on the completion strategy of the International Criminal Tribunal for Rwanda,* UN Doc. S/2009/587, 12 November 2009, para. 64; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 19 November 2014,* UN Doc. S/2014/826, 19 November, para. 58; *Report on the completion of the mandate of the International Criminal Tribunal for Rwanda as at 15 November 2015,* UN Doc. S/2015/884, 17 November 2015, paras. 144-145.

[107] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 19 November 2014,* UN Doc. S/2014/826, 19 November, para. 58.

of national reconciliation and guarantee the protection of the archives at the same time.

D. The Tribunals' Archives as property of the UN

The archival records of the UN include 'the archives of the United Nations Secretariat units away from Headquarters and subsidiary organizations of the United Nations'.[108] According to the Secretary-General's bulletin 'Record-keeping and the management of United Nations archives', these are records that need to be 'permanently preserved for their administrative, fiscal, legal, historical or informational value'.[109] Because the ICTY and the ICTR are subsidiary organs of the Security Council, their archives are the property of the UN. Consequently, it has been regulated in Article 27 (1) of the IRMCT Statute that the UN has ownership over the archives of the ICTY and the ICTR and these archives are located with the respective branches of the Residual Mechanism, Article 27 (2).[110] But there could arise a confusion regarding the ownership of the records. As mentioned above, the Tribunals are subsidiary organs of the Security Council, and therefore the UN considers the Tribunals' records a part of their archives.[111] Consequently, because the archives are the property of the UN, they need to be kept under the control of the UN. The archives of the UN contain records that, regardless of their form or medium, need to be permanently safeguarded for their legal, administrative, fiscal, informational, or historical value.[112] However, that definition was drafted with ordinary UN archives in mind where most of the material was generated and stored by UN personnel, primarily for internal use.[113] But the consequences of applying this definition to the records of the Tribunals is that according to the UN General Convention on the Privileges and Immunities of the UN, the Tribunals' archives need to be protected from unauthorised access in the same way as the archives of the UN.[114]

Pursuant to Article II, Section 3 of the UN General Convention, the property and assets of the UN have to be inviolable. Furthermore, the property needs to be immune from search, requisition, confiscation, expropriation, and any other form of interference whether by executive, administrative, judicial, or legislative action. Also according to Section 4, the archives of the UN and in general all documents belonging to or held by it have to be inviolable wherever located. Therefore, pursuant to the UN General Convention, all

[108] Secretary-General's bulletin, *United Nations archives and records management,* UN Doc. ST/SGB/242, 26 June 1991.
[109] Secretary-General's bulletin, *Record-keeping and the management of United Nations archives*, UN Doc. ST/SGB/2007/5, 12 February 2007.
[110] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2014 to 15 May 2015,* UN Doc. S/2015/341, 15 May 2015, para. 51.
[111] Secretary-General' Report, see note 1, paras. 15, 41.
[112] Ibid., para. 41.
[113] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 47, p. 10.
[114] UN General Convention on the Privileges and Immunities of the United Nations adopted by the General Assembly of the United Nations on 13 February 1946 (1 UNTS 15). This Convention appeared In the Journal of the General Assembly, I, No. 34 (7 March 1946), pages 687-693; and in Document A/43, Annex I, pp. 5-15.

materials and information managed by the Tribunals enjoy immunity from outside intrusion and unwarranted access.[115] However, the decision that the UN archiving policy applies automatically to the Tribunals' archives is problematic, because the handling in general of these records is difficult. To balance the following interests, it is of crucial importance that the availability of the material and the information to the public has to be guaranteed versus the protection of the victims and witnesses as well as sensitive documents. Therefore, the special nature of the Tribunals' judicial records needs to be taken into consideration when managing the Tribunals' archives. The issue of archives is very important to communities in former Yugoslavia and Rwanda, who see the records as part of their history.

It needs to be taken into consideration that a part of the records may not fall under the legal property of the UN because, for example, it was secured in the region of former Yugoslavia. On the grounds that everything coming into the possession of an international tribunal becomes ipso facto its property, the Tribunals assume that all materials that are in the custody of the Tribunal are UN property.[116] Consequently, the UN deprives the original owner of his property rights. Regarding this approach Acquaviva argues that there is no existing title that would justify the UN claims to property for records that were retrieved by investigators and other personnel from archives of former Yugoslavia, or records composed of private diaries or pictures seized from individuals. [117] Further, there is no existing title that could trump competing claims by states or private parties. In some domestic jurisdictions, when proceedings come to an end a person whose property has been seized for investigation purposes is able to reclaim it.[118] As long as the owner wants to exercise his right, the right belongs to the owner because there is no clear legal basis for a title trumping the claims of the original owners regarding property rights of documents and other items seized in connection with the proceedings. However, in international criminal law and procedure, a provision regulating this situation does not exist.[119] Acquaviva also points out that the legal basis for the decision of the Security Council to explicitly tie the property of the Tribunals' archives to the UN is questionable. According to Acquaviva, 'It would be hard to argue that a threat to international peace and security (the basis for a binding resolution under Chapter VII) requires divesting national authorities and private individuals of their rights over the records in question after the

[115] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 47, p. 10.
[116] Secretary-General's Report, see note 1, para. 186; Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 47, p. 13.
[117] Ibid.
[118] Ibid.
[119] Ibid.

threat itself has ceased to require an international tribunal.'[120]

Although there are cases in which judges ordered the return of material that was collected as potential evidence to the original owner because of a lack of judicial interest, the examination of case law does not solve the issue. In the decision Prosecutor v. Delalić et al.[121] the Chamber directed the Prosecution 'to return to the accused such items of evidence as were seized from, or belonging to, the accused Zejnil Delalić which are not material to the preparation of its case.' Acquaviva argues that ambiguous wording leads to the assumption that the Tribunals do not actually consider themselves owners of the material seized from the accused.[122] In fact, as soon as property is not important to the proceedings, the original material is no longer needed and can be consequently returned to the original owner. However, relevant original records, such as a personal diary, may be copied faithfully and afterwards returned to the owner. But the Tribunals still hold rights over their own creations, including all files and copies made from original material. [123]

It must be noted that state archives are normally the property of states, including the archives of all public bodies and agencies. Treaties regulate explicit instances of state succession and archives, as in the specific situation of former Yugoslavia.[124] In principle, the states that arise from the dissolution of a former state have the right to request the part of the original archives needed for the administration of its territory. Furthermore, the new states may provide each other with copies of the parts of the archives that were allotted to them.[125] Therefore, according to Acquaviva it could be argued that, for example, each of the states that arose from the dissolution of former Yugoslavia has become owner of part of the federation's former archives.[126]

In the case of the Yugoslav archives, the records were collected by the ICTY in order to carry out its mandate. A part of the material was reproduced in the form of copies or scans. The reproduced records are property of the ICTY but the ownership of the original seized or gathered records is not so certain. According to the Secretary-General's report, the Tribunals' archives are the property of the UN. But the report does not mention the issue that competing claims from other private or public subjects are possible.[127] It is noted that the Tribunals are custodians of the material as long as is necessary for the case, including protection of witnesses or other sensitive sources. However, there is no reason to

[120] Ibid.
[121] *Prosecutor v. Zejnal Delalić et al.* (Case No. IT-962-1-T), Trial Chamber Judgement, 16 November 1998.
[122] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 47, p. 14.
[123] Ibid.
[124] Marija Oblak-Carni and Born Bohte, 'Succession to the Archives of the former SFR Yugoslavia' in Mojmir Mrak (ed.) *Succession of States* (Martinus Nijhoff Publishers, Leiden 1999), p. 171.
[125] Ibid., p.175.
[126] Guido Acquaviva, 'Best Before the Date Indicated: Residual Mechanisms at the ICTY', see note 47, p. 14; Marija Oblak-Carni and Born Bohte, 'Succession to the Archives of the former SFR Yugoslavia', see note 124, pp.180-185.
[127] Secretary-General's Report, see note 1, para. 41.

limit original property rights when the records are no longer necessary. Therefore, the option of transferring the archives to the affected countries after confidential documents have been declassified could be considered. But it would be very expensive to move the archives to another location, and in the case of former Yugoslavia it would be difficult to decide which of the six countries concerned should house the archives. To copy all documents would be very costly and time-consuming. Further, splitting the archives would violate the principle of archival integrity, which provides the archives should be kept as a single entity.[128] In addition, the archives also have a value for memory, education, and research. The control over the archives equates the control over the past and the future.[129] Therefore, the accuracy of the records needs to be guaranteed. Historical revisionism in the affected countries could endanger this accuracy. Thus, it was a necessary solution to locate the archives to The Hague and Arusha.

E. Preparation of Records for Migration to the Residual Mechanism

The Residual Mechanism assumed responsibility for the management of the archives of both Tribunals and the Tribunals retained responsibility for the preparation of their records for transfer.[130] Under the leadership of the Registrar, the Registry is responsible for carrying out the essential function regarding the preservation and management of the archives. The Residual Mechanisms Archives and Records Section was established to coordinate, in close cooperation with the two Tribunals, the transfer of custody of the Tribunals' archives to the Residual Mechanism.[131] The Residual Mechanisms Archives and Records Section developed standards for the preparation and transfer of records of the Tribunals. Furthermore, it reviews and streamlines the current procedures, policies and systems for the operation and the management of the centres where those records will be kept. The Residual Mechanism Archives and Records Section also determined appropriate classification levels in accordance with the Secretary-General's bulletin.[132]

In accordance with international standards, the Section preserves the archives and provides secure storage for physical and digital records. The Section developed a trusted digital repository designed to ensure secure storage for these records.[133] The Residual

[128] Theodore R. Schellenberg, *Modern Archives: Principles and Techniques* (The University of Chicago Press, Chicago 1956), p. 15.
[129] Irene C. Lu 'Curtain Call at Closing: The Multi-Dimensional Legacy of the International Criminal Tribunal For Rwanda' University of Pennsylvania journal of international law, Volume 34, 2013 p. 893.
[130] Article 27 of the IRMCT Statute, Article 6 of the Transitional Arangements.
[131] *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 60; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 23 May 2013 to 15 November 2013,* UN Doc. S/2013/679, 18 November 2013, para. 59.
[132] Secretary-General's bulletin, *International Criminal Tribunals: information sensitivity, classification, handling and access,* UN Doc. ST/SGB/2012/3, 20 July 2012.
[133] *Report of the Internationa lResidual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 60.

Mechanism has a twofold task of making access to records possible while at the same time ensuring the strong protection of confidential information. However, the archives will receive increasing attention in the future. The Archives and Records Section mounted the first public exhibitions of the archives of the ICTY for International Archives Day in June 2015 and The Hague International Day in September 2015.[134] A revamped, fully searchable online judicial database was provided along with public exhibitions and participation in archives awareness events.[135] The Residual Mechanisms Archives and Records Section and the Office of the Registrar are developing a policy to allow public access to records of the Tribunals and the Residual Mechanism, based on the principle of openness and transparency of the work of the UN.[136]

Further, the Residual Mechanism Archives and Records Section supports Tribunal offices in preparing their records for transfer to the Residual Mechanism. It provides training for staff and briefings for managers to guarantee that the required standards are met. And the Tribunal offices continue to identify and appraise their records and prepare appropriate records for transfer.[137] The Residual Mechanisms Archives and Records Section also implemented a new computer system to increase the efficiency and speed up of the transfer process.[138] In addition, the Registrar established a high-level Records and Archives Working Group to coordinate and monitor the transfer of Tribunal records and archives to the Residual Mechanism. The Group drew up an overall plan and a comprehensive risk assessment for the project.[139] A working group responsible for the establishment of the emergency response and disaster recovery plan for physical records was established. However, the group has since been disbanded and replaced by a standing committee.[140].

It is planned that the transfer is completed by the time that the ICTY and ICTR are liquidated.[141] According to the report, the transfer has progressed according to schedule.[142]

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[134] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2015,* UN Doc. S/2015/883, 17 November 2015, para. 58.
[135] *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 61.
[136] *Third annual report of the International Residual Mechanism Criminal Tribunals,* UN Doc. A/70/225–S/2015/586, 31 July 2015, para. 48.
[137] *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) covering the period from 16 May 2015 to 16 November 2015,* UN Doc. S/2015/874, 16 November 2015, para. *34; Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2014 to 15 May 2015,* UN Doc. S/2015/341, 15 May 2015, para. 53.
[138] *Twenty-second annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991,* UN Doc. A/70/226-S/2015/585, 31 July 2015, para. 73; *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) covering the period from 16 May 2015 to 16 November 2015,* UN Doc. S/2015/874, 16 November 2015, para. 33.
[139] Ibid.
[140] *Third annual report of the International Residual Mechanism Criminal Tribunals,* UN Doc. A/70/225–S/2015/586, 31 July 2015, para. 48.
[141] *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 60.

The ICTY transferred the physical records of all completed cases to the Residual Mechanism. According to the Residual Mechanism's progress report, approximately 41% of its anticipated volume of physical archives and 80% of its digital records have been transferred to the Residual Mechanism.[143] Since 1 March 2014, the Section is further responsible for managing the Judicial Records Unit of the ICTY, which manages that Tribunal's judicial records and is preparing them for transfer to the Residual Mechanism.[144] The Office of the Prosecutor is also working with the Office of the Prosecutor of the ICTY to prepare the records to be transferred to The Hague branch. Further, the ICTY has also begun transferring digital records. The Tribunal is consulting the Archives and Records Section and the Information Technology Service Section in order to enhance its records management system and procedure.[145] This shall improve the efficiency and effectiveness of these transfers. A major part of the records is still being prepared for transfer and training of managers and staff is on-going. In September 2015, the Archives and Records Section assumed responsibility for the management of an additional temporary repository at the premises of the International Tribunal for former Yugoslavia in order to provide secure, short-term storage for physical records and archives.[146]

According to the Residual Mechanism's progress report, the Residual Mechanism Archives and Records Section has completed the transfer of all physical records of the ICTR.[147] The Arusha branch houses 3,489 boxes of material received from the Office of the Prosecutor of the ICTR. In addition, the Prosecutor's evidence vault, with a collection comprising 105.55 linear metres of documents, was transferred to the custody of the Arusha branch of the Office of the Prosecutor in April 2015. In addition, 8.3 terabytes of digital records have been transferred from the ICTR to the Residual Mechanism. On 4 March 2015 and 1 May 2015 an Associate Records Manager and an Associate Information Manager were recruited on an ad hoc basis in order to manage the Prosecutor's records and evidence collection efficiently. In accordance with the Secretary-General's bulletin on

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[142] Ibid., para. 61; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2015 to 15 May 2016,* UN Doc. S/2016/453, 17 May 2016, para. 72.

[143] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2016,* UN Doc. S/2016/975, 17 November 2016, para. 84.

[144] *Second annual report of the International Residual Mechanism for Criminal Tribunals' UN Doc. A/69/226-S/2014/555, 1 August 2014, para. 65; UN Security Council 'Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 61.

[145] *Third annual report of the International Residual Mechanism Criminal Tribunals,* UN Doc. A/70/225–S/2015/586, 31 July 2015, para. 47; *Assessment and report of Judge Theodor Meron, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004) covering the period from 16 May 2015 to 16 November 2015*, UN Doc. S/2015/874, 16 November 2015, para. 73; *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2014 to 15 May 2015,* UN Doc. S/2015/341, 15 May 2015, para. 55.

[146] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2015,* UN Doc. S/2015/883, 17 November 2015, para. 56.

[147] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2016,* UN Doc. S/2016/975, 17 November 2016, para. 82.

'International Criminal Tribunals: information sensitivity, classification, handling and access' regarding international criminal tribunals and the Residual Mechanism's standard for the preparation and transfer of records for digital records, they worked closely with staff of the Office of the Prosecutor of the ICTR concerning the classification of its evidence and records. [148] The Residual Mechanism's Archives and Records Section planned new premises for the Residual Mechanism in Arusha by providing additional functional requirements, specifications, and estimates of resource requirements for the archives building.[149] But the Section also works on the development of a digital repository for secure storage of the digital archives. This shall enable their long-term preservation and access for current and future generations.[150] Additionally, record-keeping policies and systems for the Residual Mechanism have been developed, including systems for the management of judicial and non-judicial records in order to increase operational efficiency and effectiveness.[151] Furthermore, since 1 January 2014, the Residual Mechanism Archives and Records Section has been responsible for managing the resource and research centre of the ICTR, which is one of the best international law research resources in East Africa. The centre provides research and reference services to the Tribunal and Residual Mechanism staff, as well as to external users, including the general public.[152]

The Residual Mechanism subscribed in June 2015 to the Universal Declaration on Archives reaffirming its commitment to best practices in the management of archives and the provision of access to them.[153] In November 2011, the Universal Declaration on Archives was adopted by the 36th Session of the General Conference of UNESCO. The aim of the Universal Declaration on Archives is inter alia to support the management of archives and to ensure their authenticity, reliability, and integrity as well as usability. The Declaration was developed by a special working group of the International Council on Archives in order to improve understanding and awareness of archives among the general public and key decision-makers.[154] The International Council on Archives is a collective of archival institutions and archives and records management professionals worldwide and

[148] Secretary-General's bulletin, *International Criminal Tribunals: information sensitivity, classification, handling and access,* UN Doc. ST/SGB/2012/3, 20 July 2012; *Third annual report of the International Residual Mechanism Criminal Tribunals,* UN Doc. A/70/225–S/2015/586, 31 July 2015; *First Annual Report of the International Residual Mechanism for Criminal Tribunals,* UN Doc. A/68/219-S/2013/464, 2 August 2013, para. 50; *Progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron (for the period from 1 July to 14 November 2012),* UN Doc. S/2012/849, 16 November 2012; *Second annual report of the International Residual Mechanism for Criminal Tribunal*s, UN Doc. A/69/226-S/2014/555, para. 34.

[149] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2015,* UN Doc. S/2015/883, 17 November 2015, para. 57.

[150] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 November 2014 to 15 May 2015,* UN Doc. S/2015/341, 15 May 2015, para. 56.

[151] Ibid.

[152] *Second annual report of the International Residual Mechanism for Criminal Tribunals,* UN Doc. A/69/226-S/2014/555, 1 August 2014, para. 65; *Report of the International Residual Mechanism for Criminal Tribunals on the progress of its work in the initial period,* UN Doc. S/2015/896, 20 November 2015, para. 61.

[153] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2015,* UN Doc. S/2015/883, 17 November 2015, para. 58.

[154] UNESCO General Conference, 36th Session, Paris 2011, Universal Decleration on Archives, available at: http://unesdoc.unesco.org/images/0021/002134/213423e.pdf (last visited on 16 May 2017).

was established at UNESCO on 9 June 1948.[155] The Archives and Records Section also continues to lead or contribute to the development of policies, including a comprehensive access policy, and record-keeping systems for the Residual Mechanism, including systems for the management of judicial and non-judicial records in the interest of enhancing operational efficiency and effectiveness.[156]

5. Transferring the Management and Preservation of the Tribunals' Archives to National Authorities

According to Section 7 of the Secretary-General's bulletin 'International Criminal Tribunals: information sensitivity, classification, handling and access', the Tribunals 'shall ensure that sufficient measures are taken to protect the confidentiality and integrity of sensitive records and information, and that their management and handling in all formats is appropriate to their security classification.'[157] But at the time the Residual Mechanism was established, there was no existing location in the affected countries that would meet the standards for preservation and access to the archives. In addition, the administrative and judicial functions are all strongly intertwined with the Tribunals' archives. Most of the activities of the Residual Mechanism could hardly be envisaged without access to the records of past proceedings, both public and confidential. Furthermore, the execution of the residual functions by the Residual Mechanism will also produce new material that will be closely connected to the Tribunals' records. The national authorities could not be entrusted with such a task. The Tribunals' records include a great deal of confidential documents, the security of which needs to be guaranteed in order to ensure the protection of victims and witnesses. This can only be ensured if the archives are preserved in a country that has not been affected by the atrocities. Furthermore, the archives exist in order to prevent historical revisionism in the affected regions. It is very important that the historical narrative cannot be manipulated in order to suit regime interests, which has already been attempted in Rwanda. Under these circumstances, and based on the premise that the control of the Tribunals' archives equates control of the past the future, it would not be feasible to transfer the archives to domestic systems.

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[155] Ibid.

[156] *Assessment and progress report of the President of the International Residual Mechanism for Criminal Tribunals, Judge Theodor Meron, for the period from 16 May to 15 November 2015,* UN Doc. S/2015/883, 17 November 2015, para. 55.

[157] Secretary-General's bulletin, *International Criminal Tribunals: information sensitivity, classification, handling and access* UN Doc. ST/SGB/2012/3, 20 July 2012.

IX. Conclusion

The reason for the Security Council to establish the ad hoc Tribunals was that the national jurisdictions in Rwanda and the states of former Yugoslavia were not reliable. But by the time the Residual Mechanism was established, the judicial capacities had improved in the affected countries. However, when the Completion Strategy was developed the Security Council was faced with the crucial question of how to deal with the case of the remaining fugitives after the Tribunals' closure. On the one hand, there was a need for justice and the goal of the Tribunals to achieve the mandate of ending impunity for the most serious breaches of international humanitarian law. But on the other hand, the Tribunals faced a huge financial burden.

This thesis answers the research question of whether it was necessary to establish the Residual Mechanism or whether another solution would have been preferable. The ICTY transferred eight cases to states of former Yugoslavia, and the ICTR transferred three cases to Rwanda. The review of the transferred cases and the monitoring reports show that the countries of Rwanda and former Yugoslavia can conduct war crimes cases in accordance with international standards. But although judicial capacities have improved, issues still exist. Concerns exist regarding witness protection, custody questions, and the transparency of proceedings. Further, while deciding on the establishment of the Residual Mechanism, Ratko Mladić, who was one of the most prominent war criminals of the war, was still at large. And at the time when the Security Council decided to establish the Residual Mechanism, no monitoring reports were available that could show if the justice systems were able to conduct fair trials. Therefore, transferring the judicial responsibility of cases concerning high-level fugitives to national jurisdictions of the affected countries was not a good option.

Even today it would be difficult to transfer residual functions to national authorities in order to reduce the workload as well as the costs of the Residual Mechanism. It would make sense to transfer the supervision and enforcement of sentences to national authorities, since national authorities contribute to this residual function already. Furthermore, according to Rule 128 of the IRMCT RPE the Security Council is allowed to designate a body to supervise the sentences after the Residual Mechanism is closed. A good solution could be to transfer the function to national authorities and implement a monitoring system. This would reduce the workload of the Residual Mechanism. But in order to avoid unfairness, the Residual Mechanism would need to rely on monitoring reports submitted by independent experts and intervene, if unjustified unequal treatment occurs. In addition, the Residual Mechanism could transfer proceedings concerning contempt cases to national

jurisdictions. The Residual Mechanism has the jurisdiction to refer cases concerning offences against the administration of justice to national jurisdictions. Article 70 (4) of the Rome Statute regulates that contempt offences can be prosecuted by national jurisdictions instead of the Court. Hence, this approach is recognised in international criminal justice, and so the Residual Mechanism could adopt that procedure.

The residual function that will likely never come to an end is the management and preservation of the Tribunals' archives. These are primarily used for judicial activities, though their secondary value for memory, education and research should not be underestimated. The records hold great value for future projects, like the creation of future institutions comparable with the Residual Mechanism. Locating the archives in the affected countries was not feasible, because there was no existing location in those countries that would meet international standards for security, preservation, and access to the archives. Furthermore, an accurate protection of the records of the atrocities committed is necessary in order to avoid denial of the crimes. In the context of denial, a serious problem is the general political climate throughout the region of former Yugoslavia. It is enormously important to prevent the glorification of war criminals as heroes. The most practical solution has been to maintain the Tribunals' archives in The Hague and Arusha, whilst encouraging the establishment of information centres in the affected countries to facilitate access. The centres remain one of the key components of the Tribunals' legacy for future generations while serving as the UN reference centre for information on genocide for the benefit of the entire international community. On the one hand, the people of the affected countries are able to access information regarding the crimes committed against humanity and, on the other hand, the protection of the records is guaranteed. The co-locations in The Hague and Arusha meet international standards for security and preservation. Therefore, the information centres were the best option to support the process of national reconciliation and guarantee the protection of the archives at the same time.

The most important residual function is the Tribunals' trial activities. Residual issues involve the tasks of on-going legal and moral responsibilities to those directly affected by the Tribunals. Therefore, in order to maintain the Tribunals' legacy, it is of crucial importance to guarantee a proper trial for the high-level fugitives still at large. Although the support for domestic prosecutions of members of the ethnic majority and the willingness to cooperate with the Tribunals have increased in the states of former Yugoslavia, the risk is left that the high-level fugitives are still supported by some political elites. Further, the escape of Stanković invited criticism. The predominant supportive atmosphere in which war crime trials against accused persons of one certain ethnic group

were conducted influenced witnesses. Some media presented war criminals as national heroes. In such a negative atmosphere witnesses particularly insider witnesses, may refuse to testify for fear of reprisals.

Although Croatia is part of the European Union and Serbia wants to become a part of the European Union, which requires the achievement of European judicial standards, it would not be reasonable to transfer the residual functions to one of these countries. Because of the longstanding conflict between the different ethnicities, which culminated during the terrible war, it is not possible to pick out one country that should have the power to judge the war crimes. This might create new conflicts between these countries. Therefore, it is the preferable option to locate the residual functions outside the area of former Yugoslavia. This way, none of the countries is disadvantaged.

Regarding Rwanda, a critical point is the fact that the Rwandan Prosecution did not always pursue atrocities perpetrated by the Rwandan Patriotic Front. Although the Rwandan justice system was found to be sufficiently independent from executive influence, concerns appeared regarding genocide cases. Outside pressure on the judiciary regarding genocide cases existed because of the past actions of the government. The analyses of the monitoring reports do not demonstrate any violation of the accused's fair trial rights. But it is not guaranteed that the impartiality would have been extended to high-level accused persons. The successful completion of the Tribunals' work depends on trials conducted with the highest standards of international human rights and due process. In addition, it is necessary that possible impunity will be excluded.

In order to demonstrate that the international legal system is working and to achieve a deterrent effect, the preferable option was to create the Residual Mechanism and not to transfer the functions of the Tribunals to the states of former Yugoslavia or Rwanda. Considering the atrocities occurred in former Yugoslavia and Rwanda, it is plausible that tension between the various ethnicities still exists. In the affected states of former Yugoslavia there are still problems with denial. In Rwanda, the government disseminated a national reconciliation program that protects the singular narrative of Rwandan genocide history, which minimizes the participation of the Rwandan Patriotic Front in atrocities committed during the genocide. Therefore, although the judicial capacity has improved, the victims' interests overweight this improvement. The high-level fugitives must be tried before an international and certainly impartial court. Further, in the case of referral to domestic courts, the downside would be that there is no guarantee that proper prosecutions will take place and that the rights of the accused will be safeguarded at a level deemed acceptable by the UN. Securing fairness and due process standards is especially important

for a legal system, which would be at risk when transferring the cases of the remaining fugitives to domestic courts. In particular, referring the cases of a high-level fugitives to countries affected by their atrocities would risk the rights of the accused as there is an aftermath of the war left in the lives and minds of the effected populations. With regard to the longstanding conflict between the ethnicities of former Yugoslavia and the atrocities committed against the Tutsi population in Rwanda, it cannot be expected that people have forgotten what happened. Therefore, it was not certain whether the affected countries could provide fair trials in compliance with international standards.

It also needs to be considered that the authority of an international body, like the Tribunals, is more powerful than that of individual states. Rwanda or the states of former Yugoslavia would not enjoy the benefit from such authority when asking for international cooperation to arrest the high-level fugitives. High-level fugitives in particular do often benefit from the help and protection of state entities, and the Tribunals can ask these states to operate according to international legal obligations. Therefore, the Residual Mechanism has an authority similar to that of the Tribunals, which simplifies the request for cooperation from other states. Implementing the Residual Mechanism is an appropriate decision as only an institution on an international level may have the power and the authority to urge the states to cooperate. And the assistance of the international community is easier to achieve for an international body like the Residual Mechanism.

Furthermore, it has been experienced that only few states were willing and able to undertake the expensive and complex trials. So it would be even more difficult to find a state that would take over the trial function of the Tribunals. And referring the cases to different national authorities would result in divergent application of the Tribunals' provisions and case law. This would lead to an uncertain legal situation and could result in a violation of the accused's rights and risk the Tribunals' legacy. In addition, national jurisdictions could not be required to review judgements based on the Tribunals' Statutes and Rules of Procedure and Evidence. The lack of knowledge of the Tribunals' jurisprudence could result in an unfair limitation of the convicted persons' rights. Furthermore, domestic courts would be able to set aside the judgements of the Tribunals. That would destroy the Tribunals' legacy. The Residual Mechanism avoids these issues as it is an unbiased international body that provides the review of judgment on an international level.

It is not possible to transfer residual functions to different states or institutions. The residual functions are closely intertwined. In addition, the Residual Mechanism has the authority to issue decisions that bind states, individuals, and other entities when necessary.

Therefore, the effectiveness of the residual functions system would be at risk if the functionality of the Residual Mechanism relied on cooperation among different entities. Transferring all residual functions of both Tribunals to one state or each Tribunal to different states would be very difficult, because only a few states have the capacity to perform all residual functions of the Tribunals and it is unlikely that one of those would take on such a burden. Furthermore, it would be questionable whether such states would have the authority to perform residual functions toward external entities. The ICC could have played and still could play various roles in the performance of residual functions. But there are also legally important differences between the ICC and the Tribunals. The ICC has different temporal and geographic jurisdiction. Some of the crimes are differently defined in the Rome Statute, while Rwanda is not even a state party to the Rome Statute. Further, the procedures used by each of the Tribunals differ from those of the ICC. This option would not be more feasible regarding political, policy, legal, financial, and practical questions than creating the independent Residual Mechanism. The changes required for the ICC to perform residual functions in its own name would necessitate amendments to the Rome Statute. This would make a complete absorption of residual functions by the ICC unrealistic. Even considering the least involved options, like using the ICC facilities or ICC staff, raises problems. The staff of the ICC is busy and the facilities are occupied. Furthermore, the Residual Mechanism employs its own staff and has its own facilities already. This path was and still would be simply impracticable. In addition, the Residual Mechanism with one branch seated in Arusha offers logistical advantages and ensures a fixed presence in eastern and central Africa.

The establishment of the Residual Mechanism was not accepted uncritically. The Russian Federation required Resolution 1966 (2010) to be the last on the issue of the duration of the Tribunals' activities. The Tribunals were required to take all possible measures to expeditiously complete all their remaining work. In response to the criticism, the Security Council aimed to create the Residual Mechanism as a small and efficient body. The IRMCT Statute and the IRMCT RPE provide regulations that are appropriate to reduce the workload of the Residual Mechanism. First, when establishing the structure, it has been made sure that the Residual Mechanism remains a small and efficient body. The number of Trial Chambers has been reduced, since the Residual Mechanism has one for each branch. The Residual Mechanism consists of the Prosecutor and the Registry common to both branches. The IRMCT Statute provides for a common President of the Residual Mechanism, who will exercise his functions at each seat of the Residual Mechanism when it is necessary. A Single Judge conducts proceedings for contempt and false testimony and

the Appeals Chamber is composed of three judges instead of five. These changes do downsize the Residual Mechanism to a small body, leading to cost reductions. Second, provisions were included in the IRMCT Statue that were not statutory provisions for the Tribunals. Of most importance are Article 1 (3) IRMCT Statute, which requires the Residual Mechanism to prosecute high-level fugitives only and Article 6 (1) of the IRMCT Statute, which obliges the Residual Mechanism to refer cases to national jurisdiction concerning persons who are not high-level fugitives. The decision to impose a mandatory obligation on the Residual Mechanism ensures that the Residual Mechanism's work is as limited as possible. This amendment appears to be the consequence for the Tribunals' practice of not referring contempt cases to national jurisdictions although they had the power to transfer those cases. Transferring cases of contempt could have reduced the Tribunals' workload. Hence, Article 1 (4) of the IRMCT Statute obliges the Residual Mechanism to transfer contempt cases to national jurisdictions in order to prevent the Residual Mechanism from taking over the Tribunals' practice. In cases concerning the lower-level fugitives, it does not result in impunity because the national courts have jurisdiction to rule on those fugitives. And as the monitoring reports show, the national courts are able to conduct trials of war criminals that are not among the high-level fugitives. In addition, the Residual Mechanism does not have the power to issue any new indictments. The Residual Mechanism only has the power to conduct new indictments regarding contempt and false testimony cases. This approach will reduce the workload of the Residual Mechanism and costs regarding the trial activity.

Further, the IRMCT RPE provides the obligation for the judges to work remotely, and time limits have been included to keep proceedings as short as possible. The roster system of the judges works on a per diem basis, so the judges receive remuneration for each day they exercise their function and not only for being on the roster. This shows the Security Council's intention to ensure that the Residual Mechanism remains a small body with a high cost-efficiency. However, it is necessary that the Residual Mechanism's judges will be properly remunerated because a high quality of the Residual Mechanism's jurisdiction needs to be ensured. Otherwise the establishment of the Residual Mechanism would be useless. The remuneration system needs to allow judges to work with full concentration on their cases. The Security Council could solve the problem by returning judges to the Residual Mechanism on a permanent basis for certain cases. For example, in appeals cases the judge could receive remuneration while in The Hague until the decision has been issued.

But at the same time Resolution 1966 (2010) provides provisions that prepare a smooth transfer of the residual functions from the Tribunals to the Residual Mechanism. A smooth transfer was very important to ensure the Tribunals' legacy. Closing a criminal court is not a usual affair and certain legal and practical obligations of the Tribunals will necessarily continue beyond their closure. The IRMCT Statute is in accordance with the Tribunals' Statutes. The provisions contain only slight variations from analogous provisions from the Tribunals' Statutes. This illustrates that the Residual Mechanism has the role of inheriting the Tribunals' legacy.

The Transitional Arrangements provide for a smooth transfer of the Tribunals' functions and responsibilities to the Residual Mechanism. The Transitional Arrangements provide the Commencement Date as the explicit date when the Tribunals' jurisdiction ends and the jurisdiction of the Residual Mechanism begins. Because uncertainties regarding the jurisdiction would result in legal insecurity, it is only consistent that decisions taken by the Tribunals after the Commencement Date do not have a legal effect on the Residual Mechanism. Thus, the Transitional Arrangements provide a clear-cut procedure regarding the jurisdiction of the Tribunals and the Residual Mechanism. And, in order to ensure legal certainty, decisions taken by the Tribunals while properly seized of the matter and prior the Commencement Date retain their validity before the Residual Mechanism. Article 5 (4) of the Transitional Arrangements provides that the Tribunals have to make the necessary arrangements to ensure a coordinated transfer of the residual function concerning the protection of witnesses and victims regarding all completed cases as soon as possible. Especially concerning the protection of victims and witnesses, a smooth transfer is necessary because the safety of victims and witnesses depends on a working protection strategy. The great majority of the Tribunals witnesses enjoy protection. Further, according to Article 13 (3) IRMCT Statute, the Security Council is able to veto amendments to the IRMCT RPE made by the judges of the Residual Mechanism. This ensures that the procedure of the Residual Mechanism will be the same as the Tribunals' procedures. Thereby, the continuity between the work of the Residual Mechanism and the Tribunals should be ensured and the Tribunals' legacy preserved. But at the same time, Article 13 (3) prevents the Residual Mechanism's judges from adopting provisions that would increase their workload or prolong trial proceedings. Thus, a judicial revolution of the IRMCT RPE shall be prevented in order to ensure the legacy of the Tribunals.

The jurisdiction continuity between the Tribunals and the Residual Mechanism is essential for the legacy of the ICTY and the ICTR. Although the Tribunals' jurisprudence is not expressly binding for the Residual Mechanism, the judges of the Residual

Mechanism attempt to continue their jurisdiction in concordance with the Tribunals' jurisprudence. In cases where their respective Rules of Procedure and Evidence or Statutes are at issue, the Residual Mechanism is bound to consider the relevant precedent of the Tribunals when interpreting them. The IRMCT RPE reflect the Security Council's intention to ensure that the Residual Mechanism's proceedings mirror those of the Tribunals. This continuity between the Tribunals and the Residual Mechanism is necessary because otherwise, all accused persons of referred cases could attempt to request a revocation of the referral in their cases. This would result in a massive workload for the Residual Mechanism and would contradict the Security Council's intention to reduce the work of the Residual Mechanism as much as possible.

Creating a joint Residual Mechanism including the SCSL, the ICTY, and the ICTR would have been a better option. The RSCSL in Sierra Leone provides accessibility to the trials and documents for victims and witnesses and the visibility of the progressing work of the court in the country. The access to the archives is of special importance. Further, the work of the SCSL is a possibility to rebuild the Sierra Leonean jurisdictional system, and it also serves as a symbol against impunity for atrocities committed in that region. This could be at risk if the Residual Mechanism were located outside Sierra Leone. Further, the legal basis of the SCSL differs from that of the ICTY and the ICTR. These legal differences could make a joint Residual Mechanism complicated. But the legal differences would not make that option unfeasible. When deciding on a joint Residual Mechanism, the question would have been where to locate the institution. It would have been a good option to create a third branch of the ICTY and ICTR Residual Mechanism with regard to funding and efficiency.

The establishment of the Residual Mechanism sends a strong message against impunity and is the manifestation of the full determination of the international community not to tolerate impunity. The Tribunals have significantly contributed to the facilitation of international criminal justice. The Residual Mechanism is a important organ that will take over essential functions and maintain the legacy of the Tribunals. It has the potential to create a safe space for those traumatised by their experiences. Because the residual issues refer to the enduring tasks of legal and moral obligations to the affected individuals, the Residual Mechanism continues the objectives of the Tribunals, including important responsibilities such as matters of life or death and the protection of fundamental human rights. Legacy should be the basis for future efforts to prevent a recurrence of crimes by and build faith in judicial processes. Beside the ICTY and ICTR, there are several ad hoc UN or UN-assisted criminal tribunals that will be likely to require Residual Mechanisms

with functions similar to those of the Residual Mechanism. Future tribunals, like the Special Tribunal for Lebanon, could be attached to the Residual Mechanism. This would demonstrate that the international legal system is functioning and at the same time it could reduce spending.

At the time the Residual Mechanism was created, a strong signal was sent not only to the countries that were hiding fugitives, but also to the entire world community. The opportunity to complete the work of the ad hoc Tribunals ensures a form of continuity and is a guarantee that the international legal system is working. The Residual Mechanism's existence is one of the foundations of legal certainty.

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